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BRIEFS
ON THE
LAW OF INSURANCE


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SUPPLEMENT
VOLUME 6

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PREFACE

THIRTEEN years have elapsed since the publication of "Briefs on the Law of Insurance." During that period the law of insurance has not undergone any material change. There have been decided, however, numerous cases applying the old principles of insurance law to new forms of insurance and new conditions in policies, rendering it desirable that a Supplement to the Briefs should be published, for the purpose of making available to the practitioner these new phases of the law correlated with the principles heretofore settled by judicial decision. This, the present volumes have attempted to do—to bring within the reach of the bench and bar the latest decisions, not only as to the older forms of insurance, but also as to such comparatively new forms as Automobile Liability and Burglary and Health Insurance.

The writer takes this opportunity to express his very great appreciation of the favorable reception extended to the original volumes by the bench and bar. The preparation of the Supplement has presented difficulties not encountered in the original work, but he hopes that these supplementary volumes will be found as useful to the legal profession as the original volumes have proved to be.

ROGER W. COOLEY.

UNIVERSITY OF NORTH DAKOTA
Feb. 1, 1919.

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SUPPLEMENT
TO
BRIEFS ON THE LAW OF
INSURANCE
VOLUME 6

SUPP.B.B.INS.

(1)*

I. THE CONTRACT IN GENERAL

1. WHAT CONSTITUTES A CONTRACT OF INSURANCE

4-5. (a) Definition

5 (a). The definition of insurance given in the text is substantially the same as that given in Code Miss. 1906, § 2563.

Other definitions will be found in *State v. Willett*, 171 Ind. 296, 86 N. E. 68, 23 L. R. A. (N. S.) 197; *Rogers v. Shawnee Fire Ins. Co.*, 132 Mo. App. 275, 111 S. W. 592, 593; *Draper v. Delaware State Grange Mut. Fire Ins. Co.*, 5 Boyce (Del.) 143, 91 Atl. 206; *State ex rel. Inter-Insurance Auxillary Co. v. Revelle*, 257 Mo. 529, 165 S. W. 1084; *Commonwealth v. Metropolitan Life Ins. Co.*, 254 Pa. 510, 98 Atl. 1072.

It is of course obvious that the determination of the question whether a contract is one of insurance, or whether a corporation or association is making contracts of insurance, depends, not upon the name by which the association is called, but upon the nature of the business it transacts and of the contract it issues (*State v. Alley*, 96 Miss. 720, 51 South. 467). A mere agreement between concerns engaged in the same kind of business to indemnify each other in case of loss by fire is not an insurance contract.

Reference may be made to *Isaac H. Blanchard Co. v. Hamblin*, 162 Mo. App. 242, 144 S. W. 880; *Christie Lithograph & Printing Co. v. Same* (Mo. App.) 144 S. W. 882; *Harrison & Smith Co. v. Same*, Id.

But if the contract is otherwise an insurance contract the fact that the corporation or association confines its transactions to one particular class of property would not change its nature (*State v. Alley*, 96 Miss. 720, 51 South. 467).

5-6. (b) Forms of insurance

5 (b). A policy which insured an automobile against destruction or damage by fire, against theft, and against perils of transportation is nevertheless a fire policy, and, in an action for damage by fire, should be declared on under the code form (*Union Marine Ins. Co. v. Charlie's Transfer Co.*, 186 Ala. 443, 65 South. 78). In Ohio (*Renschler v. State ex rel. Hogan*, 90 Ohio St. 363, 107

N. E. 758, L. R. A. 1915D, 501, Ann. Cas. 1916C, 1014) a contract binding an undertaker to furnish respectable funerals was held to be an insurance contract. On the other hand, a contract agreeing to procure for subscribers medical services, drugs, and merchandise from a physician and retailers, but not guaranteeing the performance by them is not an insurance contract (State ex rel. Fishback v. Universal Service Agency, 87 Wash. 413, 151 Pac. 768, Ann. Cas. 1916C, 1017).

6-7. (c) Casualty insurance

7 (c). Where defendants employed plaintiff to manufacture trousers out of defendants' material, and, in consideration of a deduction of 1 per cent. from the amount to become due, agreed to pay for plaintiff's services if the goods should be damaged by fire, defendants did not, by such provision, assume a risk, and hence that part of the contract did not constitute an insurance contract (Stern v. Rosenthal, 128 N. Y. Supp. 711, 71 Misc. Rep. 422).

A corporation, which proposed by contract to care for plate glass for a fixed term for a certain consideration, and to replace the glass, if broken within the period of the contract, was attempting to do an insurance business (People v. Standard Plate Glass & Salvage Co., 174 App. Div. 501, 156 N. Y. Supp. 1012).

8. (e) Indemnity insurance

8 (e). A contract to indemnify an employer against liability for personal injuries suffered by his employes is a contract of insurance.

Standard Life & Accident Ins. Co. v. Bambrick Bros. Const. Co., 163 Mo. App. 504, 143 S. W. 845; Aetna Indemnity Co. v. J. R. Crowe Coal & Mining Co., 154 Fed. 545, 83 C. C. A. 431.

A new form of indemnity insurance is presented by the contract issued by the Physicians' Defense Company. By this contract the company agrees for a stated consideration to employ counsel and at its own expense to defend any action brought against the holder of the contract for damages for alleged malpractice, without, however, assuming the payment of any judgment rendered against the physician or surgeon in any action so defended. The Supreme Court of Minnesota, in Physicians' Defense Co. v. O'Brien, 100 Minn. 490, 111 N. W. 396, on reasoning which commends itself to the logical mind, held that this is a contract of insurance. The

court compares this contract with the definition of insurance, and points out that by its terms one party (the company), for a consideration stated therein, undertakes to indemnify (that is, protect against, make good by standing the expense of litigation) another (the physician) to a specified amount (not to exceed \$5,000) against loss or damage from a specified cause (an action for malpractice). Besides paying expenses the company agrees "to do some act of value" (to employ counsel and defend suits). It is obvious that, whether the judgment is against the physician or in his favor, he is loser. The same view of the contract was taken by the United States Circuit Court of Appeals (*Physicians' Defense Co. v. Cooper*, 199 Fed. 576, 118 C. C. A. 50, 47 L. R. A. (N. S.) 290, affirming [C. C.] 188 Fed. 832). On the other hand, the Supreme Court of Ohio (*State ex rel. Physicians' Defense Co. v. Laylin*, 73 Ohio St. 90, 76 N. E. 567) and the Appellate Court of Illinois (*Vredenburg v. Physicians' Defense Co.*, 126 Ill. App. 509) have held that the contract is one for services and not a contract of insurance.

8-9. (f) **Guaranty insurance**

8 (f). The term "guaranty insurance" is generic in its scope, and embraces those subsidiary species of insurance known as fidelity, commercial, and judicial insurance (*People v. Potts*, 264 Ill. 522, 106 N. E. 524). So a stipulation in a contract for furnishing prizes and voting outfit to merchants, that if their business is not of a certain amount for the year the corporation will pay them the deficiency, is a species of commercial insurance (*National Sales Co. v. Manciet*, 83 Or. 34, 162 Pac. 1055, L. R. A. 1917D, 485).

9-10. (g) **Same—Fidelity insurance**

10 (g). Contracts to indemnify against loss by dishonesty or breach of fidelity of employes are regarded as contracts of insurance as distinguished from contracts of suretyship.

John Church Co. v. Aetna Indemnity Co., 13 Ga. App. 826, 80 S. E. 1093; *Home Sav. Bank of Columbus v. Massachusetts Bonding & Ins. Co.*, 19 Ga. App. 352, 91 S. E. 494; *United States Fidelity & Guaranty Co. v. First Nat. Bank*, 137 Ill. App. 382, judgment affirmed 233 Ill. 475, 84 N. E. 670; *Crystal Ice Co. v. United Surety Co.*, 159 Mich. 102, 123 N. W. 619; *St. Louis Police Relief Ass'n v. American Bonding Co. of Baltimore*, 197 Mo. App. 430, 196 S. W. 1148; *Bissinger & Co. v. Massachusetts Bonding & Ins. Co.*, 83 Or. 288, 163 Pac. 592.

10-12. (h) Same—Credit insurance

11 (h). A contract to indemnify a merchant against loss due to the insolvency of debtors is a contract of insurance (*Lexington Grocery Co. v. Philadelphia Casualty Co.*, 157 N. C. 116, 72 S. E. 870).

A mercantile agency organized under the General Business Corporation Law may amend its articles of incorporation so as to authorize it to guarantee the accuracy of facts in its reports and to specify the amount of its liability; such guaranty not making it a credit guaranty company, within the meaning of Insurance Law, § 170, subd. 2, or amounting to any other form of insurance. *People ex rel. Dally Credit Service Corporation v. May*, 162 App. Div. 215, 147 N. Y. Supp. 487, order affirmed 212 N. Y. 561, 106 N. E. 1039.

12-13. (j) Same—Title insurance

12 (j). A contract to indemnify against loss through defects in the title to real estate is an insurance contract (*Hager v. Kentucky Title Co.*, 119 Ky. 850, 85 S. W. 183).

13-14. (k) Same—Contract insurance

13 (k). A bond of a subcontractor to construct the reinforced concrete work of a building, conditioned on the subcontractor conforming to the contract, and stipulating that the bond is executed by the surety and received by the contractor on conditions stated, is a contract of insurance (*Ætna Indemnity Co. of Hartford, Conn., v. George A. Fuller Co.*, 111 Md. 321, 73 Atl. 738, reargument denied 111 Md. 321, 74 Atl. 369.)

2. WHAT CONSTITUTES A CONTRACT OF LIFE INSURANCE**15-17. (a) Nature and essentials**

15 (a). A "contract of life insurance" is an agreement between insurer and insured whereby the insurer undertakes to pay a certain sum of money to a certain person, who usually is a person other than insured, upon the happening of a particular event, usually the death of insured, in consideration of payment by insured of certain stated premiums (*Baltimore Life Ins. Co. v. Floyd*, 5 Boyce [Del.] 201, 91 Atl. 653).

A corporation executing contracts to furnish members a funeral and all necessary requisites is engaged in writing life insurance. State

ex rel. Fishback v. Globe Casket & Undertaking Co., 82 Wash. 124, 143 Pac. 878, L. R. A. 1915B, 976. And see Renschler v. State ex rel. Hogan, 90 Ohio St. 363, 107 N. E. 758, L. R. A. 1915D, 501, Ann. Cas. 1916C, 1014.

19-21. (c) Annuities and endowments

20 (c). A contract of endowment by which insurer agreed to pay testator \$5,000 if living March 18, 1910, but if he should die before that time the contract should be void, is not a contract of insurance as defined by Rev. Laws Mass. c. 118, § 3 (Curtis v. New York Life Ins. Co., 217 Mass. 47, 104 N. E. 553, Ann. Cas. 1915C, 945).

22-23. (e) Railway relief associations

22 (e.) A railroad corporation maintaining a relief department for the relief of disabled employes who might become members thereof, guaranteeing the fulfillment of its obligations and furnishing part of its relief fund, is not engaged in the business of life or casualty insurance (Colaizzi v. Pennsylvania R. Co., 208 N. Y. 275, 101 N. E. 859, affirming judgment 128 N. Y. Supp. 312, 143 App. Div. 638).

23-24. (f) Accident insurance

23 (f). Accident insurance is a contract to indemnify against loss by reason of injury by accident, or death resulting therefrom.

National Life & Accident Ins. Co. v. Lokey, 166 Ala. 174, 52 South. 45; Eminent Household of Columbian Woodmen v. Gallant, 194 Ala. 680, 69 South. 884; State v. Willett, 171 Ind. 296, 86 N. E. 68, 23 L. R. A. (N. S.) 197; Moore v. Prudential Casualty Co., 156 N. Y. Supp. 892, 170 App. Div. 849.

3. MEMBERSHIP IN MUTUAL BENEFIT ASSOCIATION AS A CONTRACT OF INSURANCE

26-28. (b) Contracts construed as insurance contracts

27 (b). Certificates of fraternal mutual benefit associations, which provide that on the death of the member a specified sum will be paid to the designated beneficiary are life insurance contracts.

Bornstein v. District Grand Lodge No. 4, Independent Order B'nai B'rith, 84 Pac. 271, 2 Cal. App. 624; Soehner v. Grand Lodge of Order of Sons of Herman, 104 N. W. 871, 74 Neb. 399; Weinberg

v. Woodward, 124 N. Y. Supp. 480, 67 Misc. Rep. 283; Williams v. Supreme Conclave Improved Order of Heptasophs, 172 N. C. 787, 90 S. E. 888; Littleton v. Sain, 126 Tenn. 461, 150 S. W. 423, 41 L. R. A. (N. S.) 1118; Cosmopolitan Life Ins. Co. v. Koegel, 52 S. E. 166, 104 Va. 619; Robinson v. Brotherhood of Railroad Trainmen (W. Va.) 92 S. E. 730, L. R. A. 1917E, 995. But see Doscher v. Vanderbilt, 177 App. Div. 813, 164 N. Y. Supp. 264.

A complaint on a fraternal beneficiary life certificate alleging that defendant is a fraternal order, and has an insurance department for the purpose of insuring the lives of its members, is sufficient to show that defendant had capacity to issue the policy. Kammer v. Supreme Lodge K. P., 75 S. E. 177, 91 S. C. 572.

32. (e) Sick or funeral benefits

32 (e). It has been held in State v. Wichita Mut. Burial Ass'n, 73 Kan. 179, 84 Pac. 757, that a contract securing the holder thereof a burial worth \$100 in consideration of stipulated assessments to be paid by him during life is in the nature of an insurance contract.

35-36. (j) Knights of Pythias, Endowment Rank

36 (j). Certificates of membership in the Endowment Rank are regarded as life insurance contracts in Westerman v. Supreme Lodge, K. P., 196 Mo. 670, 94 S. W. 470, 5 L. R. A. (N. S.) 1114. And see, also, Tice v. Supreme Lodge, K. P., 123 Mo. App. 85, 100 S. W. 519, affirmed in 204 Mo. 349, 102 S. W. 1013.

38. (l) Odd Fellows' relief associations

38 (l). Where the constitution of a state grand lodge of a fraternal order provides that every member of each of its lodges in good financial standing is insured in the sum of \$500, the order is a beneficial life insurance association, and, though for the convenience and proper management of the insurance feature it has a special endowment department, the order, and not the endowment department, is liable on contracts of insurance (District Grand Lodge No. 23, United Order of Odd Fellows, v. Hill, 3 Ala. App. 483, 57 South. 147).

4. POWER TO WRITE INSURANCE

39. (a) In general

39 (a). Insurance is a legitimate business, in which any citizen of good character has a constitutional right to engage without arbitrary restriction (Stern v. Metropolitan Life Ins. Co., 154 N. Y. Supp. 283, 90 Misc. Rep. 129).

5. INSURANCE COMPANIES AND ASSOCIATIONS**51-53. (c) Mutual companies**

51 (c). Mutual companies have no capital stock, the policy holders taking the place of the stockholders in an ordinary corporation, and the cash paid in and the premium notes constitute the companies' assets.

Gleason v. Prudential Fire Ins. Co., 127 Tenn. 8, 151 S. W. 1030;
State v. Burgess, 101 Tex. 524, 109 S. W. 922; State v. Willett,
171 Ind. 296, 86 N. E. 68, 23 L. R. A. (N. S.) 197.

52 (c). Where plaintiff paid admission fee for membership in insurance company and paid graduated assessments upon deaths of comembers, the certificate issued was a mutual life insurance contract recognized by Insurance Law, §§ 204-230 (Sauerbrunn v. Hartford Life Ins. Co., 115 N. E. 1001, 220 N. Y. 363).

There could be no valid contract of insurance between a co-operative or assessment insurance company and a person not a member of the company (Bracken County Ins. Co. v. Murray, 179 S. W. 842, 166 Ky. 821).

53 (c). An organization possessing some features incident to a stock company and some incident to a mutual company, but being in fact neither, may be classified as a mixed company (State v. Alley, 96 Miss. 720, 51 South. 467).

53. (d) Lloyd's associations

53 (d). Though an action at law may be brought to enforce the liability of a Lloyd's association, the remedy in equity also exists, and is perhaps more adequate, as better adapted to enforce the performance of an act required of the manager in satisfaction of the decree (Parkhurst-Davis Mercantile Co. v. Merchants' Underwriters at the Indemnity of Exchange, 237 Ill. 492, 86 N. E. 1062). And to the same effect is Williamson v. Warfield, Pratt, Howell Co., 136 Ill. App. 168.

54-56. (e) Mutual benefit associations—Co-operative assessment companies

54 (e). In determining whether a company is an ordinary insurance company or a co-operative assessment company regard

must be had to the nature of the contract issued by the organization.

Knott v. Security Mut. Life Ins. Co., 144 S. W. 178, 161 Mo. App. 579; *Buchanan v. Same* (Mo. App.) 144 S. W. 185; *Redding v. Same*, Id.; *Smoot v. Bankers' Life Ass'n*, 138 Mo. App. 438, 120 S. W. 719; *Kribs v. United Order of Foresters*, 177 S. W. 766, 191 Mo. App. 524; *Jennings v. National American* (Mo. App.) 179 S. W. 789.

Generally the distinguishing feature of co-operative associations is that mortuary losses are met, not by a fixed premium payable in advance, but by post mortem assessments, intended to liquidate specific losses and levied only on surviving members.

Smoot v. Bankers' Life Ass'n, 138 Mo. App. 438, 120 S. W. 719; *Morrow v. National Life Ass'n of Des Moines, Iowa*, 184 Mo. App. 308, 168 S. W. 881; *Easter v. Brotherhood of American Yeomen*, 157 S. W. 992, 172 Mo. App. 292; *Hill v. Business Men's Accident Ass'n* (Mo. App.) 189 S. W. 587.

On the other hand, a contract expressing an undertaking in consideration of a fixed premium to pay a certain sum, without regard to assessments on persons holding similar contracts, is not assessment insurance.

Keeton v. National Union (Mo. App.) 182 S. W. 796; *Miller v. Missouri State Life Ins. Co.*, 194 Mo. App. 265, 186 S. W. 762; *Western Life & Accident Co. of Colorado v. State Ins. Board of Nebraska* (Neb.) 162 N. W. 530.

The laws of the state where the association was organized should be resorted to, in order to determine the character of the association (*Easter v. Brotherhood of American Yeomen*, 154 Mo. App. 456, 135 S. W. 964).

56-57. (f) Same—Fraternal insurance associations

56 (f). Associations organized and carried on for the sole benefit of the members and their beneficiaries, and not for profit, are usually regarded as fraternal beneficiary associations (*Tomson v. Iowa State Traveling Men's Ass'n*, 88 Neb. 399, 129 N. W. 529). Generally only such organizations as carry on their business on the lodge system, with ritualistic form of work and a representative form of government, are classified as fraternal insurance organizations or mutual benefit societies.

Brown v. Bowman, 73 S. E. 1078, 10 Ga. App. 707; *Heralds of Liberty v. Bowen*, 8 Ga. App. 325, 68 S. E. 1008; *Loyd v. Modern Woodmen*,

113 Mo. App. 19, 87 S. W. 530; *Young v. Railway Mail Ass'n*, 126 Mo. App. 325, 103 S. W. 557; *Western Commercial Travelers' Ass'n v. Tennent*, 106 S. W. 1073, 128 Mo. App. 541; *Thompson v. Royal Neighbors of America*, 154 Mo. App. 109, 133 S. W. 146; *State v. Supreme Forest Woodmen Circle*, 100 Neb. 632, 160 N. W. 980; *State v. Arlington*, 157 N. C. 640, 73 S. E. 122; *Cosmopolitan Life Ins. Co. v. Koegel*, 104 Va. 619, 52 S. E. 166. But see *Tomson v. Iowa State Traveling Men's Ass'n*, 88 Neb. 399, 129 N. W. 529, where it is held that the existence of a lodge system or representative form of government is not always essential.

An association incorporated in Massachusetts as a "fraternal union" to aid members, their dependents, widows, and orphans is a "beneficial association," and not an insurance company. *Ogle v. Barron*, 247 Pa. 19, 92 Atl. 1071.

That a fraternal benefit association offered to its members only a small prize for procuring new applications for membership was not a payment of commissions or employment of agents within Ky. St. § 679, as amended by Acts 1906, c. 141, so as to prevent the association from being a fraternal society. *Finch v. Bond*, 165 S. W. 400, 158 Ky. 389.

Where a policy of a fraternal organization was nonforfeitable after a specified number of assessments had been paid, and provided for extended insurance, it was an old line policy (*McPike v. Supreme Ruling of the Fraternal Mystic Circle*, 187 Mo. App. 679, 173 S. W. 71).

57 (f). According to the Missouri statute it is also essential that the association shall limit its payment of benefits to the family, blood relations, affianced husband or wife, or persons dependent on the member; and if the association pays benefits to the legal representatives of the insured, it cannot be classed as a fraternal organization.

Kroge v. Modern Brotherhood of America, 105 S. W. 685, 126 Mo. App. 693; *Easter v. Brotherhood of American Yeomen*, 154 Mo. App. 456, 135 S. W. 964.

An "old line life insurance company" is generally a corporation which insures any applicant who meets the rules of the company, while a strictly "mutual life insurance association," or "fraternal benefit association," is one in which the individual member is an insurer of his fellow members and is insured by them (*Filley v. Illinois Life Ins. Co.*, 93 Kan. 193, 144 Pac. 257, L. R. A. 1915D, 134).

It is, of course, the character of the association, and not the name by which it is called, that is the determining factor (*Umberger v.*

Modern Brotherhood of America, 162 Mo. App. 141, 144 S. W. 898). A Missouri association, which was, under the decisions of the Missouri courts, a fraternal association, did not become an assessment company merely because authorized to make assessments (*Travelers' Protective Ass'n v. Smith*, 183 Ind. 59, 107 N. E. 283, Ann. Cas. 1917E, 1088).

57-60. (g) Regulation and control of insurance companies and associations

58 (g). Statutes regulating insurance should be liberally construed, to bring within their provisions and remedial purpose all associations organized to conduct the insurance business, however complex and obscure the plan attempted through which to carry it on (*State v. Alley*, 96 Miss. 720, 51 South. 467).

59 (g). The New York Insurance Law, §§ 9, 50, prohibit foreign corporations not authorized to do business in the state or their agents from issuing policies of insurance on property without the state, and are constitutional (*People v. Seddon Underwriting Co.*, 140 N. Y. Supp. 466, 27 N. Y. Cr. R. 146).

60 (g). The Mississippi statute (Code 1906, § 2559) declares that "all companies, partnerships, associations, individuals and fraternal orders, whether domestic or foreign," are subject to the insurance laws, and it has been held that the provisions of the statutes apply to insurance associations in the broadest possible way, including all organizations doing an insurance business of any kind on any plan (*State v. Alley*, 96 Miss. 720, 51 South. 467).

60-62. (h) Same—Mutual benefit associations

60 (h). It is not unconstitutional for the Legislature to relieve companies and associations organized for mutual benefit from the burdens imposed on insurance companies insuring for large and unlimited amounts (*State v. Toledo & Lucas County Burial Ass'n*, 28 Ohio Cir. Ct. R. 397). An assessment company is not as a rule subject to the general insurance laws, save as mentioned in the statute itself (*Smoot v. Bankers' Life Ass'n*, 138 Mo. App. 438, 120 S. W. 719). While Ky. St. § 664, regulating and defining life insurance companies on the assessment or co-operative plan, is broad enough to include assessment burial associations, they are not required to comply with such chapter as to organizing; the Legislature by section 199a having provided special laws governing such

associations (*Newport Benev. Burial Ass'n v. Clay*, 186 S. W. 658, 170 Ky. 633).

61 (h). As a general rule fraternal insurance societies are not amenable to the general insurance laws.

Knights of the Modern Maccabees v. Commissioner of Insurance, 155 Mich. 693, 118 N. W. 585; *Loyd v. Modern Woodmen of America*, 113 Mo. App. 19, 87 S. W. 530; *Claver v. Woodmen of the World*, 133 S. W. 153, 152 Mo. App. 155; *Almond v. Modern Woodmen of America*, 113 S. W. 695, 133 Mo. App. 382; *Missey v. Supreme Lodge Knights and Ladies of Honor*, 147 Mo. App. 137, 128 S. W. 559; *Claudy v. Royal League*, 168 S. W. 593, 259 Mo. 92. But see *State v. Alley*, 96 Miss. 720, 51 South. 467.

A mutual fire insurance company is not within the rule excepting fraternal insurance organizations from the operation of the general insurance laws. *Puryear v. Farmers' Mut. Ins. Ass'n*, 137 Ga. 579, 73 S. E. 851.

The rule does not apply to associations doing a life insurance business by issuing certificates providing for the payment of a specified sum to the beneficiary on the death of the members on the members' paying fixed sums at fixed periods. *Cosmopolitan Life Ass'n v. Koegel*, 52 S. E. 166, 104 Va. 619.

It has been held in Missouri (*Tice v. Supreme Lodge, K. P.*, 123 Mo. App. 85, 100 S. W. 519, affirmed in 204 Mo. 349, 102 S. W. 1013) that the Uniformed Rank, Knights of Pythias, is not within the purview of the act relating to fraternal beneficiary associations, though it pays death benefits. Similarly it has been held that an association of railway mail clerks, organized to furnish accident insurance to its members, without any initiatory ceremony or ritualistic form of work, and which admitted members merely on their paying the required dues, is not within the statute regulating fraternal benefit associations (*Young v. Railway Mail Ass'n*, 103 S. W. 557, 126 Mo. App. 325).

A benefit society incorporated in Iowa, and coming into Nebraska to do business, under permission granted by its laws, is subject to the same limitations as a similar society organized in Nebraska (*Dworak v. Supreme Lodge of Western Bohemian Fraternal Ass'n [Neb.]* 163 N. W. 471). While a statute regulating fraternal benefit associations applies to both foreign and domestic associations, yet, if the foreign association has not complied with the provisions of the statute relating to the admission of such associations to do business in the state, it will be amenable to the general insurance

laws (*Loyal Americans of the Republic v. McClanahan*, 50 Tex. Civ. App. 256, 109 S. W. 973).

In order that a foreign association shall be able to take advantage of the special statutes relating to fraternal insurance societies in an action on a certificate issued by it, it must plead and prove that it possesses the essential qualifications of such a society, and that it has been admitted to do business in the state as such (*Gruwell v. National Council, Knights and Ladies of Security*, 126 Mo. App. 496, 104 S. W. 884). The laws of the state where the association was organized should be resorted to for the purpose of determining whether it is a fraternal association within the exemption (*Easter v. Brotherhood of American Yeomen*, 154 Mo. App. 456, 135 S. W. 964). But the character of the business transacted in Pennsylvania by an Alabama beneficial association will be determined by the law of Pennsylvania, when the subject of judicial inquiry therein (*Marcus v. Heralds of Liberty*, 88 Atl. 678, 241 Pa. 429).

As to the sufficiency of the pleading to put in issue the character of the association as a life insurance company subject to the general laws or as a fraternal benefit society, see *Krause v. Modern Woodmen of America*, 183 Iowa, 199, 110 N. W. 452.

62-63. (i) Conduct of business

62 (i). A title insurance company incorporated in Kentucky by a special act before the adoption of the present Constitution of that state and given powers and privileges which like companies organized under the act of March 19, 1894 (Acts 1894, c. 99), do not have, is restricted to the exercise of powers given by such act (*Hager v. Kentucky Title Co.*, 119 Ky. 850, 85 S. W. 183).

63-65. (j) Same—Mutual benefit associations

63 (j). Courts will not ordinarily interfere with the internal management of a mutual benefit society, unless the society itself refuses or neglects to perform its duty (*Kane v. Knights of Columbus*, 79 Atl. 63, 84 Conn. 96). But it is a generally recognized rule that such associations cannot do a general insurance business on the old line plan (*State ex rel. Supreme Lodge, K. P., v. Vandiver*, 213 Mo. 187, 111 S. W. 911, 15 Ann. Cas. 283).

64 (j). A voluntary unincorporated fraternal life association may be sued without making all its members parties (*Home Benefit Ass'n No. 3 of Coleman County v. Wester* [Tex. Civ. App.] 146 S. W. 1022).

65. (k) Same—Management of mortuary fund

65 (k). Fraternal insurance societies may create a mortuary or reserve fund to be used for the payment of death claims (*Kane v. Knights of Columbus*, 84 Conn. 96, 79 Atl. 63). Such a fund is in the nature of a trust fund.

Kane v. Knights of Columbus, 84 Conn. 96, 79 Atl. 63; *Attorney General v. Supreme Council, A. L. H.*, 92 N. E. 136, 206 Mass. 158; *Brenizer v. Supreme Council, Royal Arcanum*, 53 S. E. 835, 141 N. C. 409, 6 L. R. A. (N. S.) 235. But see *Wolfstern v. Pennsylvania Railroad Voluntary Relief Department*, 76 N. J. Eq. 78, 74 Atl. 533.

Being in the nature of a trust fund for a special purpose, it cannot as a rule be diverted or appropriated to any other purpose.

Supreme Tribe of Ben Hur v. Galley, 117 Ark. 145, 173 S. W. 838; *Kane v. Knights of Columbus*, 84 Conn. 96, 79 Atl. 63; *Whaley v. Bankers' Union of the World*, 39 Tex. Civ. App. 385, 88 S. W. 259; *Wolfstern v. Pennsylvania Railroad Voluntary Relief Dept.*, 76 N. J. Eq. 78, 74 Atl. 533. And see *Kelshaw v. Bankers' Life Ins. Co.*, 117 App. Div. 726, 102 N. Y. Supp. 700.

The courts may control the payment of funds collected by a fraternal benefit association in accordance with the rules of law (*Royal League v. Shields*, 96 N. E. 45, 251 Ill. 250). So equity will enforce the trust with which funds of a fraternal association, accumulated for the payment of benefits, is impressed, and prevent a diversion of such funds to purposes other than those specified in the association's charter and laws (*National Circle, Daughters of Isabella, v. Hines*, 88 Conn. 676, 92 Atl. 401).

66-68. (l) Agents

67 (l). Generally those who, with the assent of the company, act for it in soliciting or procuring or contracting for insurance, are agents of the company, though not formally appointed (*Wortham v. Illinois Life Ins. Co. [Ky.]* 107 S. W. 276). To the same effect is *Mahoney v. Minnesota Farmers' Mut. Ins. Co., of Minneapolis*, 136 Minn. 34, 161 N. W. 217. So, too, the local representative of the general agent of the insurer, who effected the insurance, delivered the policy, and collected the premium, was the "agent" of the insurer (*National Union Fire Ins. Co. v. Burkholder*, 116 Va. 942, 83 S. E. 404). Under the Iowa statute, one who solicits or procures an application for insurance is the agent of the company (*Hartman &*

Daniels v. Hallowell, 126 Iowa, 643, 102 N. W. 524). And even where the original application or offer to enter into the contract is made by the insured, the fact that there was no actual solicitation by the agent does not affect his status as agent for the company in the procurement of the policy (*Salzman v. Machinery Mut. Ins. Ass'n*, 142 Iowa, 99, 120 N. W. 697).

68 (1). An insurance broker is ordinarily one who is engaged in the business of procuring insurance for such persons as apply to him for that service, and he is usually the agent of the insured.

Morriss v. Home Ins. Co., 139 N. Y. Supp. 674, 78 Misc. Rep. 303; *Condon v. Exton-Hall Brokerage & Vessel Agency*, 142 N. Y. Supp. 548, 80 Misc. Rep. 360, judgment reversed 144 N. Y. Supp. 760, 83 Misc. Rep. 130; *Salzano v. Marine Ins. Co.*, 159 N. Y. Supp. 277, 173 App. Div. 275; *Monast v. Manhattan Life Ins. Co.*, 32 R. I. 557, 79 Atl. 932.

The fact that the broker receives a commission from the company with which he places the business does not of itself constitute him the agent of the company.

Morris McGraw Wooden Ware Co. v. German Fire Ins. Co. of Pittsburgh, Pa., 52 South. 183, 126 La. 32, 38 L. R. A. (N. S.) 614, 20 Ann. Cas. 1229; *Monast v. Manhattan Life Ins. Co.*, 32 R. I. 557, 79 Atl. 932.

Of course, an agent for one company may, if he places insurance in other companies of which he is not the authorized agent, in respect to such companies be merely a broker or agent of the insured (*Morris McGraw Wooden Ware Co. v. German Fire Ins. Co. of Pittsburgh*, 126 La. 32, 52 South. 183, 38 L. R. A. [N. S.] 614, 20 Ann. Cas. 1229). Thus, where an agent of a life insurance company which had rejected an application, told applicant's husband that he could procure insurance in another company, and applicant's husband told him to "go ahead and get her in any good company," and the agent obtained a policy through an agent of another company, he was the agent of the applicant, and not of the insurer (*Michigan Mut. Life Ins. Co. v. Thompson*, 44 Ind. App. 180, 86 N. E. 503). So a general insurance agent, to whom application for insurance was made, who obtained it from defendant through its agent, became the agent of the insurer in the transaction (*Maca-tawa Transp. Co. v. Firemen's Fund Ins. Co.*, 179 Mich. 443, 146 N. W. 396). On the other hand, one acting as a broker may under some conditions be the agent of the insurer. Thus an insurance

broker, intrusted by insurer with delivery of a policy and collection of the premium, is the agent of insurer (*Farber v. American Automobile Ins. Co.*, 177 S. W. 675, 191 Mo. App. 307).

Under Civ. Code S. C. 1902, § 1810 (Civ. Code 1912, § 2712), an insurance agent who, because he could not write a policy in his own company, "brokered" it to the agent of another company was the agent of such other company. *Maryland Casualty Co. v. Gaffney Mfg. Co.*, 76 S. E. 1069, 93 S. C. 406.

For sufficiency of evidence to warrant a finding that a broker, through whom the insurance was procured, was the agent of the insurer rather than the insured, see *Lehmann v. Hartford Fire Ins. Co.*, 167 S. W. 1047, 183 Mo. App. 696.

68-70. (m) Same—Subordinate lodge as agent

68 (m). The general principle is recognized in many cases that the subordinate lodge of a mutual benefit association and its officers are the agents of the supreme lodge, and not of the insured.

Knights of Maccabees of the World v. Pelton, 21 Colo. App. 185, 121 Pac. 949; *Rasicot v. Royal Neighbors of America*, 18 Idaho, 85, 108 Pac. 1048, 29 L. R. A. (N. S.) 433, 138 Am. St. Rep. 180; *Jones v. Supreme Lodge, Knights of Honor*, 236 Ill. 113, 86 N. E. 191, 127 Am. St. Rep. 277; *Saucerman v. Court of Honor*, 150 Ill. App. 550; *Trotter v. Grand Lodge of Iowa Legion of Honor*, 132 Iowa, 513, 109 N. W. 1099, 7 L. R. A. (N. S.) 569, 11 Ann. Cas. 533; *Collver v. Modern Woodmen of America*, 154 Iowa, 615, 135 N. W. 67; *Godwin v. National Council Knights and Ladies of Security*, 148 S. W. 980, 166 Mo. App. 289; *Pringle v. Modern Woodmen of America*, 76 Neb. 384, 113 N. W. 231; *Henton v. Sovereign Camp, Woodmen of the World*, 87 Neb. 552, 127 N. W. 869, 138 Am. St. Rep. 500; *Supreme Lodge, United, Benevolent Ass'n, v. Lawson*, 63 Tex. Civ. App. 273, 133 S. W. 907; *Johanson v. Grand Lodge, A. O. U. W.*, 86 Pac. 494, 31 Utah, 45; *Dromgold v. Royal Neighbors of America*, 103 N. E. 584, 261 Ill. 60, reversing judgment 177 Ill. App. 1; *Gilmore v. Modern Protective Ass'n*, 171 Ill. App. 525; *Harvick v. Modern Woodmen of America*, 158 Ill. App. 570; *O'Connor v. Knights and Ladies of Security (Iowa)* 158 N. W. 761, L. R. A. 1917B, 897; *Chandler v. Royal Highlanders (Neb.)* 162 N. W. 642; *Patton v. Women of Woodcraft*, 65 Or. 33, 131 Pac. 521. But see *Attorney General v. Supreme Council American Legion of Honor*, 206 Mass. 180, 92 N. E. 145, where it was held that a protest against the reduction of the amount of the certificate made to an officer of the subordinate lodge was not a protest to the corporation.

A by-law of a fraternal benefit insurance society, providing that the local officers shall be considered as agents of the members in accept-

ing and transmitting payments for insurance, is valid. *Hartman v. National Council*, 76 Or. 153, 147 Pac. 931, L. R. A. 1915E, 152. To the same effect is *Somo v. Supreme Court I. O. F.*, 83 Or. 654, 164 P. 187.

6. WHO MAY TAKE OUT INSURANCE

70-71. (a) Right in general

71 (a). The trustees of a school district may insure the property of the district (*Clark School Twp. v. Home Ins. & Trust Co.*, 20 Ind. App. 543, 51 N. E. 107).

73-76. (d) Infants—Life insurance

75 (d). A statute in Nebraska provides that life insurance companies shall not enter into insurance contracts with infants under the age of 15. It has been held, however, in *Security Mut. Life Ins. Co. v. Miller*, 75 Neb. 257, 106 N. W. 229, that a policy on the life of a boy 14 years old, with a memorandum that the company issuing the policy would not assume any risk on account of the death of the insured until he had arrived at the age of 15 years and was examined by an examiner of the company and the examination approved by the medical director, is not void under the statute.

76-77. (e) Corollary—Insurance on life of child

77 (e). The New York statute (Laws 1892, c. 690, § 55), which provides that a policy on the life of a child under two years of age shall not be issued to an amount exceeding \$30, does not prohibit the issuing of several policies, each for that amount.

O'Rourke v. John Hancock Mut. Life Ins. Co., 30 N. Y. Supp. 215; *Flynn v. Prudential Ins. Co.*, 145 App. Div. 704, 130 N. Y. Supp. 546.

7. GENERAL NATURE OF THE INSURANCE CONTRACT

78-79. (b) Fundamental characteristics

78 (b). The contract of insurance is a voluntary contract (*Dunton v. Westchester Fire Ins. Co.*, 104 Me. 372, 71 Atl. 1037, 20 L. R. A. [N. S.] 1058), in which the insurer may fix the terms on which it will insure, and, a person having accepted insurance on such terms, they constitute a contract between the company and the in-

sured, which courts may not vary (*Maryland Casualty Co. v. Chew*, 122 S. W. 642, 92 Ark. 276). The fact that the contract is in the standard form prescribed by legislative enactment does not affect its character as a voluntary contract (*Dunton v. Westchester Fire Ins. Co.*, 104 Me. 372, 71 Atl. 1037, 20 L. R. A. [N. S.] 1058).

82-84. (e) Insurance as a personal contract

83 (e). The general principle that the contract of insurance is personal and cannot be assigned without the insurer's consent is recognized in respect to employers' liability insurance, and it was therefore held in *White v. Maryland Casualty Co.*, 139 App. Div. 179, 123 N. Y. Supp. 840, that a corporation which took over the business of the employer had no such interest in an existing policy of liability insurance as would entitle it to sue as plaintiff to recover an amount paid in settlement of an action against its predecessor for personal injuries.

8. CONTRACTS OF INSURANCE AS CONTRACTS OF INDEMNITY

85-87. (a) Insurance of property

85 (a). Contracts of insurance against loss of or damage to property are contracts of indemnity.

Whitney Estate Co. v. Northern Assur. Co. of London, 101 Pac. 911, 155 Cal. 521, 23 L. R. A. (N. S.) 123, 18 Ann. Cas. 512; *Draper v. Delaware State Grange Mut. Fire Ins. Co.*, 5 Boyce (Del.) 143, 91 Atl. 206; *Getchell v. Mercantile & Mfrs. Mut. Fire Ins. Co.*, 83 Atl. 801, 109 Me. 274, 42 L. R. A. (N. S.) 135, Ann. Cas. 1913E, 738; *Palatine Ins. Co. v. O'Brien*, 107 Md. 341, 68 Atl. 484, 16 L. R. A. (N. S.) 1055; *Stanisics v. Hartford Fire Ins. Co.*, 83 Neb. 768, 120 N. W. 435; *Rogers v. Shawnee Fire Ins. Co. of Topeka, Kan.*, 111 S. W. 592, 593, 132 Mo. App. 275; *Scheel v. German-American Ins. Co.*, 76 Atl. 507, 228 Pa. 44. And see *State v. Willett*, 171 Ind. 296, 86 N. E. 68, 23 L. R. A. (N. S.) 197.

87 (a). The insured will not, therefore, be allowed to recover more than will compensate him for the loss or damage actually sustained and thus make a profit on his contract.

Whitney Estate Co. v. Northern Assur. Co., 155 Cal. 521, 101 Pac. 911, 23 L. R. A. (N. S.) 123, 18 Ann. Cas. 512; *Palatine Ins. Co. v. O'Brien*, 107 Md. 341, 68 Atl. 484, 16 L. R. A. (N. S.) 1055.

88-89. (c) Employers' liability

88 (c). An employers' liability bond is essentially a contract of indemnity.

Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co., 154 Fed. 545, 83 C. C. A. 431. And see *Most v. Massachusetts Bonding & Ins. Co.* (Mo. App.) 196 S. W. 1064.

89. (New) Physicians' indemnity contracts

89 (c). Very similar to employers' liability contracts are those issued to protect physicians against actions for malpractice. Such contracts are also in every respect contracts of indemnity.

Physicians' Defense Co. v. Cooper (C. C.) 188 Fed. 832. But see *Vredenburg v. Physicians' Defense Co.*, 126 Ill. App. 509.

89-90. (d) Life and accident insurance

90 (d). The general principle that life insurance contracts are not contracts of indemnity is asserted in some recent cases.

Reed v. Provident Sav. Life Assur. Soc. of New York, 82 N. E. 734, 190 N. Y. 111; *Wayland v. Western Life Indemnity Co.*, 166 Mo. App. 221, 148 S. W. 626.

A contract for accident insurance is an investment, not an indemnity contract (*Suttles v. Railway Mail Ass'n*, 141 N. Y. Supp. 1024, 156 App. Div. 435).

**9. LIFE INSURANCE POLICY AS AN ENTIRE CONTRACT OR
CONTRACT FROM YEAR TO YEAR**

100-102. (c) Doctrine of New York Life Ins. Co. v. Statham

101 (c). The doctrine asserted in the Statham Case has also been approved in *Haas v. Mutual Life Ins. Co.*, 84 Neb. 682, 121 N. W. 996, 26 L. R. A. (N. S.) 747, 19 Ann. Cas. 58, where it is held that a life policy is not a contract for a single year, with a privilege of renewal from year to year by payment of the annual premium, but is an entire contract for life, subject, when so stipulated, to forfeiture for nonpayment of any premium installment, and such an installment is not intended as the consideration for the year in which paid, but is in part consideration of the entire insurance for life.

A life insurance policy is not a contract for one year with right to continue, but a contract indivisible and continuous. *Titlow v. Reliance*

Life Ins. Co., 246 Pa. 503, 92 Atl. 747. See, also, Provident Sav. Life Assur. Soc. v. Taylor, 142 Fed. 709, 74 C. C. A. 41, affirming (C. C.) 134 Fed. 932.

10. WHAT MAY BE THE SUBJECT OF INSURANCE

109-110. (e) Existence and condition of property

109 (e). A valid contract of insurance cannot be written if the subject thereof has ceased to exist (Waterloo Lumber Co. v. Des Moines Ins. Co., 158 Iowa, 563, 138 N. W. 504, 51 L. R. A. [N. S.] 539). But, where the policy was antedated, the destruction of property between date of the policy and its issuance will not invalidate the policy (El Dia Ins. Co. v. Sinclair, 228 F. 833, 143 C. C. A. 231).

112-114. (g) Subjects of life or accident insurance

113 (g). Under the provisions of the Indiana statute (Burns' Ann. St. 1908, § 4713) the issuance of a policy of insurance when the insured has not been subjected to, and satisfactorily passed, a medical examination by a duly authorized physician, is forbidden; hence, a contract with a burial association was held to contravene the statute in the absence of such examination (State v. Willett, 171 Ind. 296, 86 N. E. 68, 23 L. R. A. [N. S.] 197).

114. (h) Subjects of guaranty and indemnity insurance

114 (h). A contract to indemnify the owner of an automobile against liability for injuries to other persons was upheld in Gould v. Brock, 221 Pa. 38, 69 Atl. 1122, on the general theory that a person has a right to protect himself by insurance from an adverse result of uncertain litigation. The question arose over the right of the insurance company to come in and defend in an action brought by the person injured against the insured. The right was sustained on the theory stated above.

Employers' liability policies generally provide that the employes, injury to whom is covered by the policy, shall be over a designated age. It is not essential, however, that the plaintiff, in an action on the policy, should allege that the injured employé was over the age so designated (Travelers' Ins. Co. v. Henderson Cotton Mills, 120 Ky. 218, 85 S. W. 1090, 117 Am. St. Rep. 585, 9 Ann. Cas. 162).

11. GENERAL RIGHTS AND LIABILITIES INCIDENT TO THE CONTRACT**117-118. (c) Right to loan on policy**

118 (c). The provisions contained in a life policy relating to the right to a loan thereon, and the conditions on which such loan will be made, are part of the contract between insurer and insured, and are valid (*Continental Life Ins. & Inv. Co. v. Hattabaugh*, 21 Idaho, 285, 121 Pac. 81). As such conditions are part of the insurance contract, the insurer cannot, in the loan contract, insert more onerous conditions (*Bozeman's Adm'r v. Prudential Ins. Co.*, 130 Ky. 572, 113 S. W. 836). And even if such provision is valid, in view of provisions of the policy, a clause in a contract of loan that if the loan, with accumulated interest, shall equal the legal reserve for the policy, the company may demand immediate payment, and, if payment is not made, may cancel the policy, is available only where there is no balance of reserve above the loan and interest (*Bozeman's Adm'r v. Prudential Ins. Co.*, 130 Ky. 572, 113 S. W. 836).

Both the insured and the beneficiary in a life policy, procuring a loan from insurer secured by a pledge of the policy, are estopped from setting up that the act of the insurer was ultra vires, if they do not offer to repay the loan (*Frese v. Mutual Life Ins. Co. of New York*, 105 P. 265, 11 Cal. App. 387).

A contract between an insurer and insured and the beneficiary for the pledge of the policy to secure a loan, which stipulates that insurer shall loan a specified sum, and that insured and beneficiary shall assign the policy as collateral, and that, in the event of the nonpayment of the debt at maturity, insurer may, at its "option," cancel the policy, and apply the cash surrender value to the payment of the debt, evidences a loan transaction, and not a sale or option to sell; the word "option" in the contract meaning that insurer may, on default, at its pleasure, apply the cash surrender value in payment of the loan (*Frese v. Mutual Life Ins. Co.*, 105 P. 265, 11 Cal. App. 387). Where an insurance policy was antedated seven years, and insured executed an agreement to pay the premiums for those years, the indebtedness to be a lien on the policy until paid, the loan agreement was binding on the beneficiary, although made without her consent or knowledge (*Hay v. Meridian Life & Trust Co.*, 57 Ind. App. 536, 101 N. E. 651).

It has been held in Kentucky that, where the insured in a paid-up policy borrowed money from the company and assigned the policy as collateral by an assignment authorizing the company, on the nonpayment of the debt to cancel the policy, the company, on the insured's failing to pay the debt, must resort to equity to enforce its rights based on the surrender value of the policy determined in the manner provided by Ky. St. 1903, § 653, and if such value exceeds the debt the excess shall be paid to the insured or shall be used for the purchase of paid-up insurance as the insured may elect (*Mutual Life Ins. Co. v. Twyman*, 92 S. W. 335, 28 Ky. Law Rep. 1153, 122 Ky. 513, 121 Am. St. Rep. 471, reversing on rehearing 89 S. W. 178, 28 Ky. Law Rep. 167).

For construction of particular loan agreements, see *Eagle v. New York Life Ins. Co.*, 48 Ind. App. 284, 91 N. E. 814; *Huffaker's Ex'r v. Michigan Mut. Life Ins. Co.*, 156 S. W. 1038, 154 Ky. 56; *Palmer v. Mutual Life Ins. Co. of New York*, 114 Minn. 1, 130 N. W. 250, Ann. Cas. 1912B, 957.

119-124. (d) Rights under endowment, participating, and tontine policies

120 (d). In cases arising in New York prior to the repeal of Laws 1892, c. 690, it was held that the right of a policy holder to share in the profits or surplus was not such a right as entitled him to an accounting. Such at least seems to be the effect of *Greeff v. Equitable Life Assur. Soc.*, 160 N. Y. 19, 54 N. E. 712, 46 L. R. A. 288, 73 Am. St. Rep. 659, and *Buford v. Equitable Assur. Soc.* 98 N. Y. Supp. 152. Nevertheless, the general principle that, where the policy provided for an equitable division of the surplus, the question what is an equitable apportionment is ultimately one for the courts has been recognized (*Uhlman v. New York Life Ins. Co.*, 109 N. Y. 421, 17 N. E. 363, 4 Am. St. Rep. 482). Since the repeal of the statute referred to, it has been held in the United States Circuit Court of Appeals for the Second Circuit that a policy holder may maintain a suit in equity on behalf of himself and all other policy holders joining, for an accounting and other equitable relief on proper allegations (*Brown v. Equitable Life Assur. Soc.*, 151 Fed. 1, 81 C. C. A. 1, 10 Ann. Cas. 402, reversing [C. C.] 142 Fed. 835). But the decree of the Circuit Court of Appeals was reversed in *Equitable Life Assur. Soc. v. Brown*, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. Ed. 682, where it was said that there is no trust relation between a mutual life insurance company and a policy

holder entitled to participate equitably in the distribution of surplus, and that wrongdoing by the officers and directors of the company, in the absence of a trust relation, would give no jurisdiction for an accounting.

Participating policy holders of life insurance company may maintain an equitable proceeding to conserve for their benefit a surplus fund accumulated under the by-laws of the company for their benefit from earnings of participating policies. *Bell v. Union Cent. Life Ins. Co.*, 33 Ohio Cir. Ct. R. 69, decision held erroneous by majority of judges sitting, but not reversed, *Union Cent. Life Ins. Co. v. Bell*, 102 N. E. 1134, 87 Ohio St. 475.

The legitimate distributees of the surplus, in the absence of a charter provision to the contrary, are of course the existing policy holders only (*Huber v. Martin*, 127 Wis. 412, 105 N. W. 1031, 1135, 3 L. R. A. [N. S.] 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400). But a provision for the apportionment of the surplus among the policy holders does not require a division of all the net surplus, but merely that a division should be made on an equitable basis consistent with the safety of the company (*Lord v. Equitable Life Assur. Soc. of United States*, 194 N. Y. 212, 87 N. E. 443).

120 (d). The fact that a fund created by a fraternal company ceased to be necessary for the purposes for which it was created, and was held for distribution as surplus, would not justify the intervention of equity to compel an accounting thereof in a suit by a member, where the complaint did not allege the terms of his contract so as to show his rights thereto (*Ryan v. Knights of Columbus*, 72 Atl. 574, 82 Conn. 91).

121 (d). Dividends accruing on a policy of insurance must be paid according to contracts under which they accrue (*Citizens' Nat. Life Ins. Co. v. Morris*, 104 Ark. 288, 148 S. W. 1019). When neither the charter nor the by-laws provide specifically by whom dividends shall be declared a payment of dividends by the company, though made without any formal declaration, is a voluntary payment, and if such payment does not impair the capital, the company cannot recover them back (*Berryman v. Bankers' Life Ins. Co.*, 117 App. Div. 730, 102 N. Y. Supp. 695). On the other hand, when dividends are declared out of the capital, a policy holder cannot maintain an action to recover them (*Berryman v. Bankers' Life Ins. Co.*, 117 App. Div. 730, 102 N. Y. Supp. 695). If the policy holder is given certain options on the completion of the dividend

period, and a knowledge of his rights under the options can be ascertained only from the company, the policy holder may, under St. Wis. 1898, § 4183, obtain an order allowing him to inspect the books of the company to obtain the necessary information (*Ellinger v. Equitable Life Assur. Soc.*, 132 Wis. 259, 111 N. W. 567, 11 L. R. A. [N. S.] 1089).

In *Mutual Life Ins. Co. of New York v. Murray*, 111 Md. 600, 75 Atl. 348, a 20-year policy provided the manner in which the policy could, before the expiration of the period, on default in payment of premiums, be transferred into a fully "paid-up policy" for a certain percentage of the original amount, and among the requirements were the surrender of the policy and the acceptance of a new form of policy, and in the same connection provided that a "paid-up policy" would not entitle insured to the surplus for which provision was made in the 20-year policy. Insured, before the expiration of the period, and while his policy was still in force with all premiums paid, consulted the company's officers and stated that he wished to commute the premiums for the remaining time, and was told that the premiums would be commuted, but that, if he died, he would lose the premiums paid. A written memorandum of the commutation was made on the policy, which simply provided that a gross sum be paid in lieu of the premiums thereafter to become due, and concluded with the expression "making the policy paid up." It was held that the written memorandum would not make the policy a "paid-up policy" within the meaning of the other terms of the policy, so as to exclude insured from participation in the surplus. In *McDonnell v. Mutual Life Ins. Co.*, 131 App. Div. 643, 116 N. Y. Supp. 35, the policy on the 15-year distribution plan provided for payment of quarterly premiums in advance, and stipulated that the policy should be credited with its distributive share of the surplus apportioned at the expiration of 15 years, and that only 15-year distribution policies "in force" at the end of such term should share in such distribution. Insured paid all premiums during the 15-year period, and died 11 days before the expiration of the period. It was held that the policy was not entitled to any distributive share of the surplus, for the words "in force" required the full payment of the premiums and that insured should be alive at the termination of the period.

In January preceding the lapse of the policy the directors of the insurance company adopted a resolution appropriating a gross sum of

money to payment of dividends on all participating policies which should be "continued in force on their anniversaries" in that calendar year, and a certain part of such sum was apportioned to the policy of the insured. Held, that the anniversary of the policy was on the ensuing November 11th, and because of its lapse on that date, it was not entitled under such resolution to participate in the dividend. *Johnson v. Mutual Ben. Life Ins. Co.*, 143 Fed. 950, 75 C. C. A. 22.

123 (d). A "tontine contract" of insurance is a life policy, and, in addition, an agreement by the insurer to hold all the premiums collected on the policies forming the class for a specified period called the "tontine period" or period of distribution, and, after paying death losses, expenses, and other losses out of the fund so accumulated, to divide the remainder among those who are alive at the end of the tontine period, and who have maintained their policies in force (*Equitable Life Assur. Society of United States v. Winn*, 126 S. W. 153, 137 Ky. 641, 28 L. R. A. [N. S.] 558).

124 (d). The nature of the obligation of an insurance company to a policy holder under the tontine dividend periods is that of a debtor and creditor under the stipulations of the agreement.

Timlin v. Equitable Life Assur. Soc., 141 Wis. 276, 124 N. W. 253; *Peters v. Same*, 200 Mass. 579, 86 N. E. 885. A tontine insurance policy issued by stock corporation conducting its insurance business on the mutual plan creates the relation of debtor and creditor, and not a trust relation which would support an action in equity for an accounting. *Townsend v. Equitable Life Assur. Society of United States*, 105 N. E. 324, 263 Ill. 432.

The relation between the holder of a tontine policy and the insurance company issuing it is not of a fiduciary character, and the company does not hold the accumulated profits as trustee (*Equitable Life Assur. Society of the United States v. Weil*, 103 Miss. 186, 60 South. 133, Ann. Cas. 1915B, 636).

In a suit by a matured tontine policy holder for an accounting of surplus, it was not necessary that all members of the class to which plaintiff's policy belonged should be made parties (*Equitable Life Assur. Society v. Winn*, 126 S. W. 153, 137 Ky. 641, 28 L. R. A. [N. S.] 558). The amount to be apportioned under a tontine policy being a matter peculiarly within the knowledge of the company the policy holder may plead by claiming an indeterminate or indefinite sum approximating a stated amount, and cast the burden upon

the company to account for the surplus and profits promised by the contract of insurance (*Ellinger v. Equitable Life Assur. Society*, 120 N. W. 235, 138 Wis. 390); and if the insurance company refused to make an accounting as ordered, the court may proceed to judgment for the sum demanded (*Equitable Life Assur. Society v. Winn*, 126 S. W. 153, 137 Ky. 641, 28 L. R. A. [N. S.] 558).

An illustration blank, attached to a tontine policy, giving the amount of surplus that would probably be earned by the policy according to past experience, is not a guaranty of the amount of the surplus; and hence, at the end of the tontine period, the insured could only recover the amount earned and apportioned by the company. *O'Brien v. Equitable Life Assur. Society of the United States*, 173 Mich. 432, 138 N. W. 1086.

The sufficiency of the pleadings in suits for accounting and recovery of the amounts due under tontine policies is considered in *Equitable Life Assur. Society of the United States v. Weil*, 103 Miss. 186, 60 South. 133, Ann. Cas. 1915B, 636, *Watts v. Equitable Life Assur. Soc.*, 105 N. Y. Supp. 363, 55 Misc. Rep. 454, and *Equitable Life Assur. Society v. Winn*, 126 S. W. 153, 137 Ky. 641, 28 L. R. A. (N. S.) 558.

124-126. (e) Matters peculiar to mutual companies

124 (e). The policy holder in a mutual company not only sustains a contract relation to the company as the insured, but he is also a member of the company.

Gleason v. Prudential Fire Ins. Co., 127 Tenn. 8, 151 S. W. 1080; *Wermuth v. Minden Lumber Co.*, 129 La. 912, 57 South. 170; *J. P. Lamb & Co. v. Merchants' Nat. Mut. Fire Ins. Co.*, 18 N. D. 253, 119 N. W. 1048; *Huber v. Martin*, 105 N. W. 1031, 1135, 127 Wis. 412, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400.

This membership commences with the taking out of the policy, and lasts only for the policy period (*Huber v. Martin*, 127 Wis. 412, 105 N. W. 1031, 1135, 3 L. R. A. [N. S.] 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400). Each member has a proportionate interest in the profits and is liable to a proportionate extent for the losses.

Huber v. Martin, 105 N. W. 1031, 1135, 127 Wis. 412, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023; *J. P. Lamb & Co. v. Merchants' Nat. Mut. Fire Ins. Co.*, 18 N. D. 253, 119 N. W. 1048.

The liability of members of a mutual insurance company organized under Laws Neb. 1897, c 45, is of the same nature as the liability of a stockholder in an ordinary stock corporation. *Randall v. McClain*, 143 N. W. 478, 94 Neb. 487.

126-128. (f) Matters peculiar to mutual benefit associations

126 (f). The charter members of a fraternal benefit association have no rights not common to other members (*Pond v. Royal League*, 127 Ill. App. 476).

127 (f). As duties of a member of a voluntary association are purely voluntary, unless the agreement between members provides to the contrary, a member may withdraw at any time without consent of association or of beneficiary in a life policy issued to him (*Somo v. Supreme Court, I. O. F.*, 83 Or. 654, 164 P. 187). If the member of a mutual benefit association voluntarily withdraws and his resignation is accepted, he ceases to be a member, and an intention to withdraw may be shown by conduct as well as by formal resignation (*Dvorak v. Bohemian Roman Catholic First Central Union*, 170 Ill. App. 624). If the member was insane at the time of asking for his withdrawal card and giving the society a release from all liability on his certificate of membership, the burden is on the society to show that no advantage was taken of the insane person, and that the contract was fair and made in good faith (*Wightman v. Grand Lodge A. O. U. W. of Missouri*, 98 S. W. 829, 121 Mo. App. 252).

Where a member of a fraternal insurance society was entitled to transfer from one class of risks to another, if in good health, and while in good health applied for such transfer, but was rejected arbitrarily, he was not bound to institute mandamus proceedings to compel such transfer in order to preserve his rights, which he effectually did by paying sufficient funds to the society's financial officer, to whom assessments were payable, to meet assessments against him on the basis of the class to which he was entitled to transfer, and directing that the moneys be applied to the payment of such assessments (*Supreme Lodge K. P. v. Andrews*, 77 N. E. 361, 39 Ind. App. 1, rehearing denied 78 N. E. 433, 39 Ind. App. 1).

128-129. (g) Same—Expulsion of members

128 (g). A member of a mutual benefit association cannot be expelled without notice and an opportunity to be heard (*Federal Life Ins. Co. v. Risinger*, 46 Ind. App. 146, 91 N. E. 533). If the charges against the member are general in their nature, and the member, having appeared, makes no objection on the ground that the charges are not specific, he cannot after expulsion complain on that ground

(*Kelly v. Grand Circle Women of Woodcraft*, 40 Wash. 691, 82 Pac. 1007). If the charges on which the member is tried are that he has made false accusations against members of the Supreme Council, members of that body are not qualified to try him, but the judgment of expulsion is voidable only, and generally cannot be collaterally attacked (*Wilcox v. Supreme Council Royal Arcanum*, 66 Misc. Rep. 253, 123 N. Y. Supp. 83). But if in an action on the benefit certificate, the pleadings presented the issue whether the expulsion was wrongful, the effort of the member to appeal within the association, and his death before trial of mandamus proceedings, the court had jurisdiction to determine that the judgment of expulsion did not bar an action on the certificate, though the beneficiary in the complaint did not set forth the facts of expulsion and ask for annulment of the judgment of expulsion (*Wilcox v. Supreme Council of Royal Arcanum*, 136 N. Y. Supp. 377, 151 App. Div. 297, reversing order 123 N. Y. Supp. 83, 66 Misc. Rep. 253).

If the laws of the association are defective in not stating the rights of members on trial and the method by which they may be protected, the court may intervene for the ascertainment of such rights, and may provide for their protection (*Shelley v. McLean*, 66 Misc. Rep. 231, 121 N. Y. Supp. 61). Where the question whether the member waived the illegality of his expulsion depends on parol evidence of facts and circumstances, it should be determined by the jury (*Dague v. Grand Lodge Brotherhood of Railroad Trainmen*, 73 Atl. 735, 111 Md. 95).

129-131. (h) Same—Remedies of members

129 (h). In the absence of a law prescribing such procedure, a member who was wrongfully expelled from the order, and thus wrongfully deprived of his contract rights, need not prosecute his remedies by appeal within the order before suing for damages for his expulsion (*Independent Order of Sons and Daughters of Jacob of America v. Wilkes*, 98 Miss. 179, 53 South. 493, 52 L. R. A. [N. S.] 817). If, however, the laws of the association do so provide, neither the member nor the beneficiary can set up wrongful expulsion, unless he has availed himself of the means of redress provided by the association.

O'Brien v. Rittman, 176 Ill. App. 237; *Kulberg v. National Council, Knights and Ladies of Security*, 145 N. W. 120, 124 Minn. 437; *National Council of Knights and Ladies of Security v. Turov*, 135 Minn. 455, 161 N. W. 225; *Beeman v. Supreme Lodge Shield of*

Honor, 29 Pa. Super. Ct. 387; *Neff v. Pennsylvania Daughters of Liberty*, 62 Pa. Super. Ct. 251.

130 (h). A by-law of a beneficial society providing that a member shall not resort to the civil courts for redress for an alleged injury unless he has exhausted every means of appeal in the order, and that the penalty for noncompliance shall be expulsion from the order, is not void as an attempt to oust the courts of their jurisdiction (*McGuinness v. Court Elm City*, No. 1, *Foresters of America*, 60 Atl. 1023, 78 Conn. 43, 3 Ann. Cas. 209). But the association may require an appeal within the order as a condition precedent to the right to resort to the courts (*Kulberg v. National Council, Knights and Ladies of Security*, 124 Minn. 437, 145 N. W. 120). Generally courts will not supervise the action of lodges in expelling a member, where only a personal or social right is involved; but will do so in case the expulsion is wrongful and deprives the member of property rights (*Wallace v. Grand Lodge of United Brothers of Friendship*, 107 S. W. 724, 32 Ky. Law Rep. 1013).

131 (h). Where proceedings for the expulsion of a member of a mutual benefit society were taken without notice to her to appear and defend, as required by the by-laws, she could not be required to take an appeal from the expulsion order until notice of conviction and subsequent expulsion had been received; and a notice of expulsion of a member and a tender of assessments, dues, etc., to the member's sister, who was not shown to have been authorized to act in her behalf, was inoperative to terminate the member's rights in the association (*Kidder v. Supreme Commandery United Order of Golden Cross*, 78 N. E. 469, 192 Mass. 326).

Where, on appeal by an expelled member of a beneficial association to the Grand President, the conviction was reversed for failure of the subordinate lodge to allow counsel to represent the member, the lodge could proceed with a new trial of the charges preferred as a matter of right, irrespective of the direction of new trial, or of the power lodged in the Grand President to make such a direction (*Shelley v. McLean*, 66 Misc. Rep. 231, 121 N. Y. Supp. 61).

II. INSURABLE INTEREST—INSURANCE OTHER THAN LIFE

1. NECESSITY OF INSURABLE INTEREST IN PROPERTY

135-136. (b) Necessity of insurable interest at inception of policy

135 (b). The existence of an insurable interest in the property insured at the inception of the policy is essential to the validity of the contract (*Bennett v. Mutual Fire Ins. Co.*, 100 Md. 337, 60 Atl. 99).

136-137. (c) Necessity of insurable interest based on the principle of indemnity

136 (c). The rule that the existence of an insurable interest in the property is essential to the validity of the contract is based on the principle that the contract is one of indemnity.

Bartling v. German Mut. Lightning & Tornado Ins. Co. of Farmers of Maxfield and Vicinity, 154 Iowa, 335, 134 N. W. 864; *Stanisics v. Hartford Fire Ins. Co.*, 120 N. W. 435, 83 Neb. 768; *Bassett v. Farmers' & Merchants' Ins. Co.*, 122 N. W. 703, 85 Neb. 85, 19 Ann. Cas. 252.

137-138. (d) Necessity of insurable interest at time of loss

137 (d). As the insurance of property is a contract of indemnity, there must be an existing insurable interest at the time the loss occurs.

Draper v. Delaware State Grange Mut. Fire Ins. Co., 5 Boyce (28 Del.) 143, 91 Atl. 206; *Randolph Mut. Ins. Co. v. Lorenz*, 147 Ill. App. 154; *Buffalo Fertilizer Co. v. Aroostook Mut. Fire Ins. Co.*, 84 Atl. 1078, 109 Me. 483; *Bennett v. Mutual Fire Ins. Co.*, 100 Md. 337, 60 Atl. 99; *Oatman v. Bankers' & Merchants' Mut. Fire Relief Ass'n*, 66 Or. 388, 133 Pac. 1183, rehearing denied 66 Or. 388, 134 Pac. 1033.

141-143. (g) Insurance without interest void as a wagering contract

142 (g). A policy made without interest is a wager policy, having nothing in common with insurance but the name and form.

Draper v. Delaware State Grange Mut. Fire Ins. Co., 5 Boyce (28 Del.) 143, 91 Atl. 206; *Bennett v. Mutual Fire Ins. Co.*, 60 Atl. 99, 100 Md. 337; *Moving Picture Co. v. Scottish Union & National Ins. Co.*, 244 Pa. 358, 90 Atl. 642.

A fire policy issued to agent of a vendor, the loss to be paid to purchaser's contractor as his interest might appear, and the balance to the purchaser, was held by equally divided court, binding on insurer, though the agent had no insurable interest. *Houran v. Aetna Ins. Co.*, 183 Mich. 418, 150 N. W. 137.

A policy to one who had previously disposed of his interest in an automobile was void, and its assignment to the owner of the machine transferred nothing (*Mowles v. Boston Ins. Co.*, 226 Mass. 426, 115 N. E. 666).

2. NATURE AND ESSENTIALS OF INSURABLE INTEREST IN PROPERTY

146-147. (b) Nature of title or ownership in general

146 (b). Generally the owner of the record title to property has an insurable interest therein (*Quackenbush v. Citizens' Ins. Co.*, 150 Mich. 555, 114 N. W. 388). So, too, one who has made a homestead entry of lands has an insurable interest in the buildings placed upon the land (*Queen of Arkansas Ins. Co. v. Taylor*, 100 Ark. 9, 138 S. W. 990).

147-148. (c) Insurable interest does not imply property

148 (c). To give one an insurable interest in the subject insured, it is not necessary that he should have an actual right of property, legal or equitable, therein.

Hartford Fire Ins. Co. v. Enoch, 96 S. W. 393, 79 Ark. 475; *Scott v. Dixie Fire Ins. Co.*, 70 W. Va. 533, 74 S. E. 659, 40 L. R. A. (N. S.) 152; *Williams Mfg. Co. v. Insurance Co. of North America*, 85 Vt. 282, 81 Atl. 916.

Any person has an insurable interest in property if he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of, the property itself (*Plum Trees Lime Co. v. Keeler*, 92 Conn. 1, 101 Atl. 509).

150-151. (e) Equitable rights and rights of possession or occupancy

150 (e). The holder of an equitable title or interest in property has an insurable interest therein.

Bartling v. German Mut. Ins. Co. (Iowa) 123 N. W. 63; *Modlin v. Atlantic Fire Ins. Co.*, 151 N. C. 35, 65 S. E. 605; *Williams Mfg. Co. v. Insurance Co. of North America*, 85 Vt. 282, 81 Atl. 916; *Scott*

PERSONS HAVING INSURABLE INTEREST IN GENERAL 156-158

v. Dixie Fire Ins. Co., 70 W. Va. 533, 74 S. E. 659, 40 L. R. A. (N. S.) 152; Scott v. Liverpool & London & Globe Ins. Co., 102 S. C. 115, 86 S. E. 484.

151-152. (2) Enforceable rights or interests

152 (f). In view of the provisions of the Arkansas statute (Kirby's Dig. § 2738), declaring that ejectment may be maintained by one claiming land under an entry made with the register and receiver of the United States Land Office, one having made such a homestead entry has an insurable interest in the buildings placed upon the land (Queen of Arkansas Ins. Co. v. Taylor, 100 Ark. 9, 138 S. W. 990).

153-155. (3) Interest in preservation of property

154 (i). Whenever one has such an interest in the property that he will suffer direct pecuniary loss by the destruction thereof, he has an insurable interest therein.

Loring v. Dutchess Ins. Co., 1 Cal. App. 186, 81 Pac. 1025; Bartling v. German Mut. Ins. Co. (Iowa) 123 N. W. 63; Hartford Fire Ins. Co. v. McClain (Ky) 85 S. W. 690; Getchell v. Mercantile & Mfrs. Mut. Fire Ins. Co., 109 Me. 274, 83 Atl. 801, 42 L. R. A. (N. S.) 135, Ann. Cas. 1913E, 738; Scott v. Dixie Fire Ins. Co., 70 W. Va. 533, 74 S. E. 659, 40 L. R. A. (N. S.) 152.

155-156. (3) Extent of interest

155 (j). In accordance with the general rule that, where one has a qualified or contingent interest, his insurable interest is measured by the extent of such interest, it has been held that, when an owner of real estate subject to a deed of trust sells the same, reserving a vendor's lien, he has no interest in such real estate, except as to vendor's lien, and hence has no other insurable interest therein (Baker v. Monumental Savings & Loan Ass'n, 58 W. Va. 408, 52 S. E. 403, 3 L. R. A. [N. S.] 79, 112 Am. St. Rep. 996).

3. PERSONS HAVING INSURABLE INTEREST IN GENERAL

156-158. (a) In general

158 (a). It has been held in Georgia (Fox v. Queen Ins. Co., 124 Ga. 948, 53 S. E. 271) that, under the provisions of Civ. Code 1895, § 2090, a parent has such an interest in the property of his child as to authorize him to make a contract of insurance in the

child's behalf in his representative capacity, though he could not do so as an individual.

159. (b) Building on land of another

159 (b). The owner of one half of a party wall has an insurable interest in his easement in the other half for support (*Nelson v. Continental Ins. Co.*, 182 Fed. 783, 105 C. C. A. 215, 31 L. R. A. [N. S.] 598).

160-161. (d) Receivers and assignees

160 (d). A receiver in bankruptcy appointed under Bankruptcy Act, § 2, has an insurable interest in the property of the bankrupt (*Reilley v. Buffalo German Ins. Co.*, 147 N. Y. Supp. 1086, 86 Misc. Rep. 69).

162. (f) Trustees and cestuis que trustent

162 (f). Where land was conveyed to plaintiff's father, because plaintiff was a minor and could not execute a valid mortgage thereon, but the father held in trust for plaintiff, the latter had an insurable interest (*Cummings v. Dirigo Mut. Fire Ins. Co.*, 112 Me. 379, 92 Atl. 298).

162-163. (g) Interest in homestead

162 (g). A husband had an insurable interest in the homestead, though the title was in the wife's name (*Funk v. Anchor Fire Ins. Co.*, 171 Iowa, 331, 153 N. W. 1048). So, too, where record title to homestead is in husband, the wife, residing with him and occupying the property as homestead of both, has an insurable interest in buildings situated thereon (*State Mut. Ins. Co. v. Green* [Okl.] 166 Pac. 105, L. R. A. 1917F, 663).

163-165. (h) Husband and wife

163 (h). In Tennessee, where the rights of a husband in the real estate of the wife are as at common law, it is held that the husband has an insurable interest in the wife's property (*Gleason v. Prudential Fire Ins. Co.*, 127 Tenn. 8, 151 S. W. 1030); and it has also been held in Georgia that, by virtue of the provisions of the Code (Civ. Code 1895, § 2090), a husband has such an insurable interest in the separate property of his wife as to authorize him to make a contract of insurance in her behalf in his representative capacity, but not as an individual (*Fox v. Queen Ins. Co.*, 53 S. E. 271, 124

Ga. 948). But, generally, a husband has no insurable interest in the separate property of his wife.

Wisecup v. American Ins. Co., 186 Mo. App. 310, 172 S. W. 73; *Bassett v. Farmers' & Merchants' Ins. Co.*, 85 Neb. 85, 122 N. W. 703, 19 Ann. Cas. 252; *Oatman v. Bankers' & Merchants' Mut. Fire Relief Ass'n*, 66 Or. 388, 133 Pac. 1183, rehearing denied 66 Or. 388, 134 Pac. 1033; *St. Paul Fire & Marine Ins. Co. v. McQuary* (Tex. Civ. App.) 194 S. W. 491.

So a husband who had conveyed to his wife an undivided half interest in his property may not thereafter insure the entire property in his own name and collect insurance thereon (*La Font v. Home Ins. Co.*, 193 Mo. App. 543, 182 S. W. 1029).

It has, however, been held in Wisconsin that a husband had an insurable interest in a dwelling house occupied by himself and family, though title was vested in his wife (*Kludt v. German Mut. Fire Ins. Co.*, 140 N. W. 321, 152 Wis. 637, 45 L. R. A. [N. S.] 1131, Ann. Cas. 1914C, 609). And in Nebraska it has been held that husband and wife have each an insurable interest in all the household furniture necessarily and actually in use regardless of whose money paid for it or by what means it was obtained (*Lenagh v. Commercial Union Assur. Co.*, 77 Neb. 649, 110 N. W. 740).

166. (j) Life tenants and remaindermen

166 (j). That a life tenant has an insurable interest in property held by her is recognized in *American Cent. Ins. Co. v. Leake* (Ky.) 104 S. W. 373, and in *Fadden v. Phoenix Ins. Co.*, 77 N. H. 392, 92 Atl. 335.

4. INSURABLE INTEREST BASED ON CONTRACT RELATIONS IN GENERAL

171-172. (c) Buildings in process of erection

171 (c). A contractor for a building may have an insurable interest sufficient to sustain a policy on the building under construction to the extent of whatever is due him, even though he is to be paid by the week and has no rights other than the statutory one of filing a mechanic's lien (*Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co.* [Tex. Civ. App.] 167 S. W. 816). It was said in *Sammons v. American Home Fire Ins. Co.*, 94 S. C. 366, 77 S. E. 1108, Ann. Cas. 1915B, 1095, that one who has contracted to furnish the

materials and erect a building has an insurable interest in the building, irrespective of payments made to him by the owner. It is, however incumbent upon the owner of the building and the contractor to prove their respective insurable interests to recover against the insurance company upon the destruction of the building during construction.

173-174. (e) Lessor and lessee

173 (e). Where the lease required the lessee to surrender on termination of term, and provided that the lessor might on default of rent retake possession, the lessor had, as reversioner, an insurable interest in the premises and any erections or additions thereto (*Richmond v. Kelsey*, 114 N. E. 319, 225 Mass. 209).

Where plaintiff leased certain land with the right of occupancy and with a provision that any improvement at the end of the lease should revert to the owner of the property, and he had the right of occupancy of the entire premises, it constituted a leasehold interest which is insurable (*Home Ins. Co. of New York v. Coker*, 43 Okl. 331, 142 Pac. 1195, Ann. Cas. 1917C, 950). So, too, where a quarry tenant erected buildings at a cost of \$2,500 and had a lease which would run for eight years requiring it to keep the buildings and machinery in good repair, it had an "insurable interest" in the buildings (*Plum Trees Lime Co. v. Keeler*, 92 Conn. 1, 101 Atl. 509). Where one occupies a house owned by his mother, with whom he had an oral agreement that he might occupy a room during her life, he having spent a large sum in improvements, he has an insurable interest in the house (*Getchell v. Mercantile & Mfrs. Mut. Fire Ins. Co.*, 109 Me. 274, 83 Atl. 801, 42 L. R. A. [N. S.] 135, Ann. Cas. 1913E, 738).

Where plaintiff had a contract with his landlord under which title to the hay raised on the land remained in the landlord until plaintiff performed his lease covenants, whereupon he was to have half the hay remaining after leaving sufficient to winter certain stock, he had an insurable interest in the hay (*Hudson v. Glens Falls Ins. Co.*, 112 N. E. 728, 218 N. Y. 133, L. R. A. 1917A, 482, reversing judgment 147 N. Y. Supp. 1117, 162 App. Div. 934).

175. (g) Partners

175 (g). A partnership has an insurable interest in property acquired with partnership funds and used in its business, though the

title is in one of the members (*Scott v. Dixie Fire Ins. Co.*, 70 W. Va. 533, 74 S. E. 659, 40 L. R. A. [N. S.] 152).

176-177. (h) Stockholders

176 (h). A stockholder has an insurable interest in corporate property, which will sustain recovery on a fire insurance policy issued to him thereon, and his interest is not necessarily measured by the value thereof, for the reason that the property is liable first for the corporate debts, and the only interest held by him is his right to share in the distribution of the proceeds after payment thereof (*Ætna Ins. Co. v. Kennedy*, 161 Ala. 600, 50 South. 73, 135 Am. St. Rep. 160).

But where an owner of property enters into a transaction by which he transfers his business and the property to a corporation in return for certain shares of stock in such corporation, the amount actually due to be determined when the value of his assets are ascertained, the contingent interest thus acquired in the shares of stock is not such an interest as will support an insurable interest in the property (*Buffalo Fertilizer Co. v. Aroostook Mut. Fire Ins. Co.*, 109 Me. 483, 84 Atl. 1078).

5. INSURABLE INTEREST OF AGENTS, CARRIERS, FACTORS, AND OTHER BAILEES

177. (a) Agents in general

177 (a). A postmaster has such an interest in government stamps, for which he was required to account, that he could recover on a burglary policy for their loss (*General Accident, Fire & Life Assur. Corporation v. Stratton*, 178 S. W. 1060, 165 Ky. 754).

177-178. (b) Consignees and persons holding property in trust or on commission

177 (b). One to whom goods are consigned for sale on commission and who is required to account to the owner for all goods received has an insurable interest therein (*Citizens' Ins. Co. v. Herpolsheimer*, 77 Neb. 232, 109 N. W. 160).

178-179. (c) Bailees—Warehousemen

178 (c). The general rule that a bailee has an insurable interest in the property bailed is supported by *American Cereal Co. v. Western Assur. Co.* (C. C.) 148 Fed. 77.

179 (c). A grain warehouseman may procure a valid insurance policy covering merchandise which may be subsequently stored with him (*Johnson v. Stewart*, 90 Atl. 349, 243 Pa. 485).

179-180. (d) Carriers

180 (d). A carrier may insure the goods left in his charge, not only for his own benefit, but for the benefit of the owners thereof (*Symmers v. Carroll*, 101 N. E. 698, 207 N. Y. 632, 47 L. R. A. [N. S.] 196, Ann. Cas. 1914C, 685, affirming order 134 N. Y. Supp. 170, 149 App. Div. 641).

6. INSURABLE INTEREST OF CREDITORS AND LIENORS IN GENERAL

180-181. (a) Creditors in general

181 (a). A general creditor has no insurable interest in the property of his debtor (*Vancouver Nat. Bank v. Law Union & Crown Ins. Co.* [C. C.] 153 Fed. 440). So a simple contract creditor without a statutory or contract lien and without a *jus in re* or a *jus in rem*, and owning a mere personal claim against his debtor, has no insurable interest in debtor's property (*Northwestern Nat. Ins. Co. v. Southern States Phosphate & Fertilizer Co.*, 20 Ga. App. 506, 93 S. E. 157).

181-182. (b) Persons making advances

181 (b). One who loans money to a business concern, taking as collateral security an assignment of a fire policy on the goods used by the borrower in his business, has an insurable interest, within Comp. Laws N. D. 1913, § 6466 (*Hecker v. Commercial State Bank of Carrington*, 35 N. D. 12, 159 N. W. 97). In *Loyd v. Planters' Mut. Ins. Co.*, 80 Ark. 486, 97 S. W. 658, it appeared that a judgment having been recovered against plaintiff, certain real estate was sold under the judgment and purchased by plaintiff in his wife's name, plaintiff and another becoming sureties on the bond given for the purchase price, after which plaintiff caused a policy of insurance to be issued on the property, and the bond was subsequently paid by the other surety. It was held that, plaintiff never having had any lien on the property or any control or custody thereof as security for his liability as surety, such liability did not constitute an insur-

able interest in the property (*Loyd v. Planters' Mut. Ins. Co.*, 97 S. W. 658, 80 Ark. 486).

182. (c) Lienors in general

182 (c). The general rule that a person having a lien on property has an insurable interest therein is supported by *American Cereal Co. v. Western Assur. Co.* (C. C.) 148 Fed. 77.

182-183. (d) Creditors having liens

183 (d). A pledgee of personal property has an insurable interest therein (*Whelen v. Goldman*, 62 Misc. Rep. 108, 115 N. Y. Supp. 1006).

7. INSURABLE INTEREST OF MORTGAGOR AND MORTGAGEE

184-185. (a) Mortgagee

184 (a). A mortgagee has an insurable interest in the property covered by the mortgage, separate and distinct from any other interest.

American Cereal Co. v. Western Assur. Co. (C. C.) 148 Fed. 77; *Loring v. Dutchess Ins. Co.*, 1 Cal. App. 186, 81 Pac. 1025; *Dalton v. Milwaukee Mechanics' Ins. Co.*, 126 Iowa, 377, 102 N. W. 120; *Dalton v. German Ins. Co.* (Iowa) 102 N. W. 1131; *Kelley v. People's Nat-Fire Ins. Co.*, 181 Ill. App. 142, affirmed in 262 Ill. 158, 104 N. E. 188, 50 L. R. A. (N. S.) 1164; *Continental Ins. Co. v. Bair* (Ind. App.) 114 N. E. 763; *Gould v. Maine Farmers' Mut. Fire Ins. Co.*, 114 Me. 416, 96 Atl. 732, L. R. A. 1917A, 604; *Loewenstein v. Queen Ins. Co.*, 127 S. W. 72, 227 Mo. 100; *Lawrence v. Union Ins. Co.*, 80 N. J. Law, 133, 76 Atl. 1053; *Miller v. Gibbs*, 108 App. Div. 103, 95 N. Y. Supp. 385; *Williams Mfg. Co. v. Insurance Co. of North America*, 85 Vt. 282, 81 Atl. 916.

185 (a). In the absence of some arrangement with the mortgagor or some obligation growing out of the relationship between them, a mortgagee could only insure mortgaged property to the extent of its interest (*Stuyvesant Ins. Co. v. Reid*, 88 S. E. 779, 171 N. C. 513). In an action upon a \$1,000 policy by the holder of a \$9,000 mortgage on the insured property, where the property, although incumbered by \$30,000 prior mortgage, was worth \$60,000, the plaintiff had an insurable interest in the property exceeding the amount of the policy (*Dodge v. Grain Shippers' Mut. Fire Ins. Ass'n*, 176 Iowa, 316, 157 N. W. 955).

185-186. (b) Mortgagor

185 (b). The mortgagor of property, since he would suffer loss from its destruction, has an insurable interest in the mortgaged property.

Kelley v. People's Nat. Fire Ins. Co., 181 Ill. App. 142, affirmed 104 N. E. 188, 262 Ill. 158, 50 L. R. A. (N. S.) 1164; *Gould v. Maine Farmers' Mut. Fire Ins. Co.*, 96 Atl. 732, 114 Me. 416, L. R. A. 1917A, 604; *Lawrence v. Union Ins. Co. of Philadelphia*, 80 N. J. Law, 133, 76 Atl. 1053; *Miller v. Gibbs*, 95 N. Y. Supp. 385, 108 App. Div. 103.

8. INSURABLE INTEREST OF VENDOR AND VENDEE**188-189. (a) Vendor**

188 (a). One who has entered into an agreement to exchange his property for other property still has an insurable interest before the agreement is performed (*Bartling v. German Mut. Ins. Co. [Iowa]* 123 N. W. 63); and, though the full price has been paid by the vendee in a bond for deed, the vendor has an insurable interest if the conveyance has not been made (*Adams v. North American Ins. Co.*, 210 Mass. 550, 96 N. E. 1094). If, however, an owner of real estate subject to a deed of trust sells the same reserving a vendor's lien, he has no interest in such real estate except as to his vendor's lien, and he has no other insurable interest therein (*Baker v. Monumental Savings & Loan Ass'n*, 52 S. E. 403, 58 W. Va. 408, 3 L. R. A. [N. S.] 79, 112 Am. St. Rep. 996).

189 (a). The holder of the legal title, subject to the rights of a buyer to acquire title by performance of a contract of sale, has an insurable interest (*Brunswick-Balke-Collender Co. v. Northern Assur. Co.*, 105 N. W. 76, 142 Mich. 29); and his interest is in no way lessened by the fact that the reserved title was supplemented by a mortgage to him on the purchaser's interest, whatever it may have been (*Brunswick-Balke-Collender Co. v. Northern Assur. Co.*, 113 N. W. 1113, 150 Mich. 311). So, too, where an owner sold his stock of merchandise under an agreement that the business should be conducted in his name, and that he was to hold the assets to indemnify him against loss by reason of debts contracted, the owner had an insurable interest in the goods, because he had a material interest in their preservation to the amount of the indebtedness for the goods bought in his name by the buyer, and because he held the excess as pledgee in trust for the buyer (*Hartford Fire Ins. Co. v. McClain*, 85 S. W. 699, 27 Ky. Law Rep. 461).

189 (a). In *Marks v. Fireman's Fund Ins. Co.* (D. C.) 175 Fed. 222, affirmed in 179 Fed. 1020, 102 C. C. A. 665, the facts were as follows: M. & Co., on February 10, 1909, sold certain beans, "duty paid, ex dock New York," evidenced by a broker's bought and sold note. Before arrival the buyers transferred their interest in the contract to F. On February 27, 1909, M. & Co. sold certain other beans to F., "ex dock in bond"; both lots being payable in cash 10 days after date of delivery. The ships on which both consignments were transported arrived at New York on March 25th and 26th, respectively, and were discharged; M. & Co. entering both lots in the custom house in bond. On March 30th they delivered to F. two delivery orders for the beans, addressed to the steamship company, on which F.'s representative engaged a bonded lighter to transfer the goods to a bonded warehouse, but while the beans were on the lighter she sank, and the beans were a total loss. Thereafter F. paid M. & Co. a sum equal to the price of the beans, but took from them an assignment of their claim against the insurance company which had insured the beans, with an agreement that suit should be prosecuted on the policies in the name of M. & Co. for S.'s benefit. It was held that, notwithstanding the payment of the price, the title to the beans remained in M. & Co. prior to their withdrawal from bond and payment of the duty, so that M. & Co. had an insurable interest therein at the time of the loss.

189-190. (b) Vendee in general

190 (b). Where a purchaser of property on which insured buildings were situated paid the consideration, but took the title in the name of the mortgagee, and received a policy in the mortgagee's name, with the loss, if any, payable to the purchaser as his interest might appear, both the purchaser and the mortgagee had an insurable interest, as defined by Civ. Code, § 2546, providing that every interest in property of such a nature that the contemplated peril might directly damnify the insured is an insurable interest (*Loring v. Dutchess Ins. Co. of Poughkeepsie*. 81 Pac. 1025, 1 Cal. App. 186). If property is conveyed by deed subsequent to a land contract under which a third person is in possession, the grantee in the deed as the owner of the record title, has an insurable interest (*Quackenbush v. Citizens' Ins. Co. of Missouri*, 114 N. W. 388, 150 Mich. 555). A sale by one without title or interest passes no in-

surable interest in the property (*Niagara Fire Ins. Co. v. Layne*, 162 Ky. 665, 172 S. W. 1090).

190-191. (c) Vendee holding under defective or fraudulent title

190 (c). A conveyance to insured of the fee before the policy was written by his wife's unwitnessed deed constituted him the equitable owner of the fee, with an insurable interest (*Padgett v. North Carolina Home Ins. Co.*, 82 S. E. 409, 98 S. C. 244).

Under Pub. Acts Mich. 1887, No. 313, § 2, as amended by Pub. Acts 2d Ex. Sess. 1912, No. 1 (How. Ann. St. § 5056), a land contract, if invalid as to provision that purchaser should exclusively handle plaintiff's beer, gave the purchaser an insurable interest, so that policy, as between himself and insurer, was valid. *Marx v. Williamsburgh City Fire Ins. Co.*, 192 Mich. 497, 158 N. W. 1052.

191-193. (d) Vendee in executory contract

191 (d). One in possession of premises under a valid subsisting contract of purchase or bond for title is an equitable owner, so as to give him an insurable interest, though he has not paid the whole of the consideration.

Zenor v. Hayes, 81 N. E. 1144, 228 Ill. 626, 13 L. R. A. (N. S.) 909;
Downs v. Michigan Commercial Ins. Co., 157 Ill. App. 32.

But it has been held in Pennsylvania (*Prospect Dye Works v. Federal Ins. Co.*, 33 Pa. Super. Ct. 223) that one who has entered into a mere parol contract of purchase, which cannot be enforced under the statute of frauds, has no insurable interest as a sole and unconditional owner.

In *Commercial Union Assur. Co. v. Ryalls*, 169 Ala. 517, 53 South. 754, the facts were these: A contract provided that S. agreed to sell to plaintiff and another, whose interest plaintiff thereafter acquired, certain real estate, on condition that the purchaser should erect certain buildings on the land by January 1, 1907, and by the 1st day of February, 1907, should erect certain other buildings, whereupon on such date S. should convey to the plaintiff the described lands for a fixed price, with a provision that if plaintiff should not have completed the house first to be built, by the 1st day of January, 1907, the contract should be void, or if on the 1st day of February the other building should not have been completed, the contract should immediately terminate. Pending the erection of the first-named building plaintiff obtained a contract of insurance,

and prior to its completion the building was burned. It was held that plaintiff had an insurable interest in the building.

193-194. (e) Vendee of personal property

193 (e). A vendee in a contract of conditional sale, who, by an express provision of the contract, is "to be held liable for loss or damage by fire or otherwise," has an insurable interest in the property, not only to the amount of his advancements towards the purchase, but also his liability for the possible destruction of the property by fire (*Ryan v. Agricultural Ins. Co.*, 73 N. E. 849, 188 Mass. 11). The purchaser of a stock of goods, complying with Sales in Bulk Law, being liable for creditors' claims to the value of the goods, has an insurable interest to that extent (*Osborne v. Phoenix Fire Ins. Co.*, 156 Pac. 5, 90 Wash. 387). Where a mining company purchased mill and machinery a corporation against which judgments had been rendered which were liens on fixtures, the company had an insurable interest in property (*Vogelstein v. Athletic Mining Co.* [Mo. App.] 192 S. W. 760).

Where a manufacturer of lumber who had contracted to sell it, and had received a large part of the proceeds under an agreement that title should pass on payment, received two small payments after defendant wrote a fire policy which covered his interest, the receipt of such payments did not destroy his insurable interest and avoid the policy (*Fuhrman v. Sun Ins. Office*, 180 Mich. 439, Ann. Cas. 1916A, 466, 147 N. W. 618).

9. INSURABLE INTEREST IN SUBJECTS OF MARINE INSURANCE

196-198. (f) Insurable interest in cargo

197 (f). The owner of a cargo of beans sold the same, "duty paid ex dock New York," as evidenced by a broker's bought and sold note. The cargo arrived in New York, was discharged, and was entered by the owner in the custom house in bond. It was held in *Marks v. Fireman's Fund Ins. Co.* (D. C.) 175 Fed. 222, affirmed in 179 Fed. 1020, 102 C. C. A. 665, that, though the price had been paid and delivery orders given to the vendee, the title to the beans remained in the seller prior to their withdrawal from bond and payment of the duty, so that the seller still had an insurable interest.

197 (f). The owner or charterer of a vessel has an insurable interest in the cargo, for a loss of which he may become responsible, as to his possible liability, and also because of his claim to freight (*Symmers v. Carroll*, 149 App. Div. 641, 134 N. Y. Supp. 170). So, too, it has been held that a towing company which is liable to the owner of a cargo for its loss has an insurable interest therein (*Western Assur. Co. v. Chesapeake Lighterage & Towing Co.*, 105 Md. 232, 65 Atl. 637, 11 Ann. Cas. 956).

199-200. (h) Insurable interest in freight

200 (h). The chartered owner of a steamship, who subchartered it for a voyage for a lump sum, one half to be paid in advance and the other half by the bill of lading freight, has an insurable interest in such freight (*Tweedie Trading Co. v. Western Assur. Co. of Toronto*, 179 Fed. 103, 102 C. C. A. 397, affirming [D. C.] 168 Fed. 962). Under Civ. Code Cal. § 2662, defining an insurable interest in freightage, a steamship company has no insurable interest in the freight to be earned on a cargo of lumber which is being loaded at the time the covering agreement for insurance was executed (*Victoria S. S. Co. v. Western Assur. Co. of Toronto*, 167 Cal. 348, 139 Pac. 807).

10. TERMINATION OF OR CHANGE IN INSURABLE INTEREST

202-203. (b) What constitutes termination of interest in general

202 (b). The insurable interest of the owner of a building is not terminated by a decree declaring the building a nuisance and ordering its removal. Until the decree is actually put into effect by the destruction or removal of the building, the structure continues to be the property of the owner, and her mere promises to abate the nuisance do not deprive her of her insurable interest therein so long as it remains undisturbed upon her land (*Irwin v. Westchester Fire Ins. Co.*, 109 N. Y. Supp. 612, 58 Misc. Rep. 441, affirmed in 133 App. Div. 920, 118 N. Y. Supp. 1115).

Where defendant company had insured plaintiff against loss of the rents of certain premises by fire and at the time plaintiff was a subtenant of the first floor at a yearly rental, and had sublet the premises with a provision terminating the lease on destruction of the building by fire, and the building was destroyed thereby, plaintiff was not entitled to judgment on the policy (*Moving Picture*

Co. of America v. Scottish Union & National Ins. Co. of Edinburgh, 90 Atl. 642, 244 Pa. 358).

203-204. (c) Transfer of subject of insurance

203 (c). An absolute transfer of the title of the insured in the subject of the insurance divests him of his entire insurable interest and terminates the policy.

Buffalo Fertilizer Co. v. Aroostook Mut. Fire Ins. Co., 109 Me. 483, 84 Atl. 1078; Bartling v. German Mut. Lightning & Tornado Ins. Co., 154 Iowa, 335, 134 N. W. 864.

204-205. (d) Same—Executory contract

204 (d). Under the South Dakota statute (Civ. Code, §§ 1802, 1809), the owner of a barn is not divested of insurable interest therein by written contract of sale, part only of the purchase money being paid and no conveyance made (Moulton v. Globe Mut. Ins. Co., 36 S. D. 339, 154 N. W. 830).

205 (d). The decision in the case of Burke v. Continental Ins. Co., 100 App. Div. 108, 91 N. Y. Supp. 402, cited in the original text at the top of this page was reversed by the Court of Appeals in Burke v. Continental Ins. Co., 184 N. Y. 77, 76 N. E. 1086. The court held that under the contract, the goods were neither held in trust by the seller nor could they be classed as goods sold, but not delivered, in view of the fact that the buyer leased the seller's warehouses in which the goods were stored, that the seller became in fact merely a caretaker, exempt under the contract from any liability for loss by fire, and that consequently the seller had no insurable interest.

209-210. (j) Interest of mortgagor and mortgagee

209 (j). If a mortgagee, insured against loss by fire, transfers the mortgage, his insurable interest is gone, and an attempt to assign all his interest in the policy, after a building on the mortgaged premises has been destroyed, to a subsequent holder of the mortgage, transfers no interest on which the transferee can sustain an action at law (Weinberger v. Agricultural Ins. Co., 80 N. J. Law, 202, 76 Atl. 343). But where the policy provided that the loss was payable to the mortgagee as its interest might appear at the time of the loss, and the mortgagee assigned the note and mortgage before loss with a guaranty of payment, it still had an insurable interest in the property by virtue of such guaranty, so that the assignment

was no defense to an action by the mortgagee on the policy (*Ma-honey v. State Ins. Co.*, 110 N. W. 1041, 133 Iowa, 570, 9 L. R. A. [N. S.] 490).

11. PLEADING AND PRACTICE AS TO INSURABLE INTEREST IN PROPERTY

214-217. (a) Pleading insurable interest—Necessity

215 (a). The insured in an action on the policy must allege an insurable interest in the property insured.

Sharp v. Niagara Fire Ins. Co., 147 S. W. 154, 164 Mo. App. 475;
Pearlman v. Metropolitan Surety Co., 111 N. Y. Supp. 882, 127 App. Div. 539.

218-222. (c) Same—Sufficiency of allegations

218 (c). The complaint should show the nature of the interest.

M. S. Dollar S. S. Co. v. Maritime Ins. Co. (C. C.) 149 Fed. 616. But see
Coen v. Denver Tp. Mut. Fire Ins. Co., 155 Ill. App. 332.

220 (c). An averment that the insured is the owner of the property is a sufficient averment of insurable interest.

Fireman's Fund Ins. Co. v. Finklestein, 73 N. E. 814, 164 Ind. 376; *Columbus Dry Goods Co. v. Globe & Rutgers Fire Ins. Co.*, 115 N. Y. Supp. 1106, 131 App. Div. 603; *Royal Ins. Co. v. W. P. Wright & Co.* (Tex. Civ. App.) 148 S. W. 824.

The sufficiency of the complaint as to the allegations of insurable interest is considered in *Loring v. Dutchess Ins. Co.*, 81 P. 1025, 1 Cal. App. 186; *Castell v. Woodcock* (Sup.) 121 N. Y. Supp. 585; *Kline Bros. & Co. v. German Union Fire Ins. Co.*, 132 N. Y. Supp. 181, 147 App. Div. 790.

226-228. (f) Right to raise defense of want of insurable interest—Estoppel to deny interest

226 (f). An inquiry as to the title of insured in the property covered by a fire policy should be made at the time of the issuance of the policy, and not deferred until after a loss has occurred (*Modlin v. Atlantic Fire Ins. Co.*, 151 N. C. 35, 65 S. E. 605).

232-234. (l) Evidence—Weight and sufficiency

232 (l). The issuance of the policy is itself prima facie evidence of interest.

Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 126 N. W. 524; Same
v. Des Moines Fire Ins. Co., 111 Minn. 538, 126 N. W. 526.

233 (1). Proof of possession of the property at and prior to the time of the issuance of a fire policy is prima facie evidence of interest (*Kobin v. St. Paul Fire & Marine Ins. Co.*, 137 N. W. 753, 150 Wis. 591).

The sufficiency of the evidence of insurable interest is considered in *Ætna Ins. Co. v. Kennedy*, 161 Ala. 600, 50 South. 73, 135 Am. St. Rep. 160.

(47)

III. INSURABLE INTEREST IN HUMAN LIFE OR HEALTH

1. NECESSITY OF INSURABLE INTEREST IN HUMAN LIFE OR HEALTH

245-246. (a) Necessity at common law

246 (a). At common law it was necessary to have an insurable interest in order to sustain a policy upon the life of another (*Grems v. Traver*, 87 Misc. Rep. 644, 148 N. Y. Supp. 200, judgment affirmed 164 App. Div. 968, 149 N. Y. Supp. 1085).

246-249. (b) The modern rule

247 (b). One who takes out a policy of insurance for his own benefit on the life of another must have an interest in the continuance of the life insured.

McFarlane v. Robertson, 137 Ga. 132, 73 S. E. 490; *American Mut. Life Ins. Co. v. Mead*, 39 Ind. App. 215, 79 N. E. 526; *State v. Willett*, 171 Ind. 296, 86 N. E. 68, 23 L. R. A. (N. S.) 197; *New York Life Ins. Co. v. Greenlee*, 42 Ind. App. 82, 84 N. E. 1101; *Hess' Adm'r v. Segenfelder*, 127 Ky. 348, 105 S. W. 476, 14 L. R. A. (N. S.) 1172, 128 Am. St. Rep. 343; *Rupp v. Western Life Indemnity Co.*, 138 Ky. 18, 127 S. W. 490, 29 L. R. A. (N. S.) 675; *Western & Southern Life Ins. Co. v. Grimes' Adm'r*, 138 Ky. 338, 128 S. W. 65; *Crismond's Adm'r v. Jones*, 117 Va. 34, 83 S. E. 1045, Ann. Cas. 1917C, 155. In *State v. Willett*, 171 Ind. 296, 86 N. E. 68, 23 L. R. A. (N. S.) 197, *American Mut. Life Ins. Co. v. Mead*, 39 Ind. App. 215, 79 N. E. 526, and *Garfinkel v. Alliance Life Ins. Co.*, 140 Ill. App. 380, special reliance was placed on the provisions of the Indiana statutes.

249-250. (c) Reasons for the rule—Wager contracts void

249 (c). A contract of life insurance not founded on an insurable interest in the life insured is a wagering contract and therefore void.

Prudential Ins. Co. of America v. Williams, 113 Ark. 373, 168 S. W. 1114; *Phenix Ins. Co. v. Hilliard*, 59 Fla. 590, 52 South. 799, 138 Am. St. Rep. 171; *Sage v. Finney*, 156 Mo. App. 30, 135 S. W. 996; *Reed v. Provident Sav. Life Assur. Soc.*, 190 N. Y. 111, 82 N. E. 734, modifying 112 App. Div. 922, 98 N. Y. Supp. 1111.

251-252. (e) Reasons for the rule—Public policy

251 (e). The rule requiring insurable interest in the life insured is based on considerations of public policy, and insurance without interest is void as contrary to public policy.

New York Life Ins. Co. v. Greenlee, 42 Ind. App. 82, 84 N. E. 1101; *Metropolitan Life Ins. Co. v. Ellison*, 83 Pac. 410, 72 Kan. 190, 3 L. R. A. (N. S.) 934, 115 Am. St. Rep. 189, 7 Ann. Cas. 909; *Western & Southern Life Ins. Co. v. Grimes' Adm'r*, 138 Ky. 338, 128 S. W. 65; *Dolan v. Supreme Council of Catholic Mut. Ben. Ass'n*, 113 N. W. 10, 13 L. R. A. (N. S.) 424, judgment overruled on rehearing, 152 Mich. 266, 116 N. W. 383, 16 L. R. A. (N. S.) 555, 15 Ann. Cas. 232; *Sage v. Finney*, 156 Mo. App. 30, 135 S. W. 996; *Lee v. Equitable Life Assur. Soc.*, 195 Mo. App. 40, 189 S. W. 1195.

252-257. (f) Policy procured by person insured payable to one without interest

253 (f). Since one has an insurable interest in his own life, he may take out a policy on his own life and make it payable to whom he will. It is not necessary that the person for whose benefit it is taken should have an insurable interest in the life insured.

The principle is supported by the following additional cases: *Cain v. Knights of Pythias of North and South America*, 11 Ga. App. 364, 75 S. E. 444; *Garfinkel v. Alliance Life Ins. Co.*, 140 Ill. App. 380; *New York Life Ins. Co. v. Greenlee*, 42 Ind. App. 82, 84 N. E. 1101; *Hess' Adm'r v. Segenfelter*, 105 S. W. 476, 127 Ky. 348, 14 L. R. A. (N. S.) 1172; *Rupp v. Western Life Indemnity Co.*, 138 Ky. 18, 127 S. W. 490, 29 L. R. A. (N. S.) 675; *Western Life Indemnity Co. v. Rupp*, 144 S. W. 743, 147 Ky. 489; *Brogi v. Brogi*, 98 N. E. 573, 211 Mass. 512; *Locher v. Kuechenmeister*, 98 S. W. 92, 120 Mo. App. 701; *Deal v. Hainley*, 135 Mo. App. 507, 116 S. W. 1; *Sage v. Finney*, 156 Mo. App. 30, 135 S. W. 996; *Reed v. Provident Sav. Life Assur. Soc.*, 82 N. E. 734, 190 N. Y. 111; *Pollock v. Household of Ruth*, 150 N. C. 211, 63 S. E. 940; *Keckley v. Coshoccon Glass Co.*, 86 Ohio St. 213, 99 N. E. 299, Ann. Cas. 1913D, 607; *Mohr v. Prudential Ins. Co.*, 32 R. I. 177, 78 Atl. 554; *Afro-American Life Ins. Co. v. Adams*, 195 Ala. 147, 70 South. 119; *United Assur. Ass'n v. Frederick (Ark.)* 195 S. W. 691; *Floyd v. Metropolitan Life Ins. Co.*, 5 Boyce (Del.) 51, 90 Atl. 404; *Langford v. National Life & Accident Ins. Co.*, 116 Ark. 527, 173 S. W. 414, Ann. Cas. 1917A. 1081; *Potvin v. Prudential Ins. Co. of America*, 114 N. E. 292, 225 Mass. 247; *Allen's Adm'r v. Pacific Mut. Life Ins. Co.*, 179 S. W. 581, 166 Ky. 605; *New York Life Ins. Co. v. Murtagh*, 69 South. 165, 137 La. 760; *Pacific Mut. Life Ins. Co. of California v. O'Neil*, 36 Okl. 792, 130 Pac. 270; *Lee v. Equitable Life Assur. Co.*,

195 Mo. App. 40, 189 S. W. 1195. But see *Dresen v. Metropolitan Life Ins. Co.*, 195 Ill. App. 292; *Marquet v. Aetna Life Ins. Co.*, 128 Tenn. 213, 159 S. W. 733, L. R. A. 1915B, 749, Ann. Cas. 1915B, 677.

257-258. (g) Same—Payment of premiums by beneficiary

257 (g). In some decisions supporting the doctrine that one may insure his own life in favor of one having no insurable interest, stress is laid on the fact that the premiums were paid by insured or by his procurement.

Reference may be made to *Sage v. Finney*, 156 Mo. App. 30, 135 S. W. 996; *Rupp v. Western Life Indemnity Co.*, 138 Ky. 18, 127 S. W. 490, 29 L. R. A. (N. S.) 675; *Pollock v. Household of Ruth*, 150 N. C. 211, 63 S. E. 940.

However, the mere fact that plaintiff paid the first premium on policies of insurance on the life of his uncle which were assigned to him did not invalidate the policies, where it appeared that he did not procure the issuance of them and knew nothing of the transaction before the policies and the assignment were brought to him (*Hardy v. Aetna Life Ins. Co.*, 70 S. E. 828, 154 N. C. 430).

258 (g). In *Little v. Arkansas Nat. Bank*, 105 Ark. 281, 152 S. W. 281, the fact that the beneficiary paid the premiums was regarded as an important element in determining the invalidity of the contract. So it has been held in Kentucky that a policy taken out on the life of another, by one who pays all the premiums, is void unless the person taking it out has at that time an insurable interest in the life of the other (*Western & Southern Life Ins. Co. v. Webster*, 189 S. W. 429, 172 Ky. 444, L. R. A. 1917B, 375, Ann. Cas. 1917C, 271). And in *Baltimore Life Ins. Co. v. Floyd*, 5 Boyce (Del.) 201, 91 Atl. 653, it was said that one of the tests of the validity of the policy is to determine who pays the premiums. On the other hand in *Langford v. National Life & Accident Ins. Co.*, 116 Ark. 527, 173 S. W. 414, Ann. Cas. 1917A, 1081, it was regarded as immaterial that the beneficiary paid the premiums.

258. (h) Same—Good faith

258 (h). In some cases the general rule is qualified by the proviso that the transaction is in good faith and not intended as an evasion of the rule against wager policies.

Reference may be made to *Mohr v. Prudential Ins. Co.*, 32 R. I. 177, 78 Atl. 554; *Hess' Adm'r v. Segenfelter*, 127 Ky. 348, 105 S. W. 476,

14 L. R. A. (N. S.) 1172, 128 Am. St. Rep. 343; Deal v. Hainley, 118 S. W. 1, 135 Mo. App. 507; Pollock v. Household of Ruth, 63 S. E. 940, 150 N. C. 211.

258-261. (4) Mutual benefit insurance

258 (i). The general rule that one cannot take out insurance on the life of one in whom he has no interest is applied in the case of mutual benefit associations (State v. Willett, 171 Ind. 296, 86 N. E. 68, 23 L. R. A. [N. S.] 197).

261 (i). The rule that one may insure his own life for the benefit of any person, though such beneficiary has no insurable interest is also applied to insurance in such associations in the absence of any law limiting the right. 15

Cain v. Knights of Pythias, 75 S. E. 444, 11 Ga. App. 364; Dolan v. Supreme Council of Catholic Mut. Ben. Ass'n, 116 N. W. 383, 152 Mich. 266, 16 L. R. A. (N. S.) 555, 15 Ann. Cas. 232, overruling on rehearing 113 N. W. 10, 13 L. R. A. (N. S.) 424.

But it would seem that in Kentucky by statute a member of a fraternal or benevolent organization, who obtains insurance upon his own life and himself pays the premiums, may not designate a first cousin, not having an insurable interest in his life, as a beneficiary, though permitted to do so by the charter of the order. Hess' Adm'r v. Segenfelter, 127 Ky. 348, 105 S. W. 476, 32 Ky. Law Rep. 225, 14 L. R. A. [N. S.] 1172, 128 Am. St. Rep. 343.

2. NECESSITY OF INSURABLE INTEREST OF ASSIGNEE OF LIFE POLICY

262-263. (b) New York

263 (b). A policy of life insurance may be legally assigned in New York to one not having an insurable interest in the life of insured (Foryciarz v. Prudential Ins. Co. of America, 158 N. Y. Supp. 834, 95 Misc. Rep. 306). 15

263-264. (c) Massachusetts

264 (c). In the absence of any evidence indicating a wagering contract, it is not necessary that assignee of a policy should have an insurable interest (Potvin v. Prudential Ins. Co. of America, 114 N. E. 292, 225 Mass. 247).

264-265. (d) Maryland

264 (d). An assignment of a valid life policy is legal whether the assignee has an insurable interest in the life of insured or not

(Fitzgerald v. Rawlings Implement Co., 79 Atl. 915, 114 Md. 470, Ann. Cas. 1912A, 650).

268. (g) Other states holding interest unnecessary

268 (g). The principle that the assignee of a life policy need not have an insurable interest in the life insured is supported by recent cases in several states.

Reference may be made to *Matlock v. Bledsoe*, 77 Ark. 60, 90 S. W. 848; *Page v. Metropolitan Life Ins. Co.*, 98 Ark. 340, 135 S. W. 911; *Rylander v. Allen*, 125 Ga. 206, 53 S. E. 1082, 6 L. R. A. (N. S.) 128, 5 Ann. Cas. 355 (under statute); *Volunteer State Life Ins. Co. v. Buchanan*, 10 Ga. App. 255, 73 S. E. 602; *Keckley v. Coshocton Glass Co.*, 99 N. E. 299, 86 Ohio St. 213, Ann. Cas. 1913D, 607; *Grant v. Independent Order of Sons and Daughters of Jacob*, 97 Miss. 182, 52 South. 698; *Prudential Ins. Co. of America v. Williams*, 113 Ark. 373, 168 S. W. 1114; *Cherokee Life Ins. Co. v. Banks*, 15 Ga. App. 65, 82 S. E. 597; *In re Phillips' Estate*, 86 Atl. 289, 238 Pa. 423, 45 L. R. A. (N. S.) 982, Ann. Cas. 1914C, 282; *Harrison's Adm'r v. Northwestern Mut. Life Ins. Co.*, 78 Vt. 473, 63 Atl. 321, 112 Am. St. Rep. 932. See *Peoria Life Ass'n v. Hines*, 132 Ill. App. 642, which seems to be contra to other Illinois cases.

268-269. (h) Missouri

269 (h). The rule in Missouri seems now to be settled to the effect that the assignee of a life policy must have an interest in the life insured.

Reference may be made to the recent cases of *Deal v. Hainley*, 135 Mo. App. 507, 116 S. W. 1; *Kelly v. Prudential Ins. Co.*, 148 Mo. App. 249, 127 S. W. 649; *Tripp v. Jordan*, 177 Mo. App. 339, 164 S. W. 158; *Lee v. Equitable Life Assur. Soc.*, 195 Mo. App. 40, 189 S. W. 1195.

270-271. (j) Federal cases

271 (j). Notwithstanding the decisions in the *Armstrong Case* and the case of *Gordon v. Ware Nat. Bank*, outlined in the original text, the Circuit Court of the United States for the Southern District of Georgia in *Mutual Life Ins. Co. v. Lane* (C. C.) 151 Fed. 276, reasserted the doctrine that an assignee must have an insurable interest, and this decision was affirmed by the Circuit Court of Appeals for the Fifth Circuit in *Alexander v. Lane*, 157 Fed. 1002, 85 C. C. A. 677, expressly on the authority of *Warnock v. Davis*. It may be conceded that in this instance, the facts justified the be-

lief that the assignment was speculative in its nature. That element must, however, be regarded as absent from *Russell v. Grigsby*, 168 Fed. 577, 94 C. C. A. 61, in which the Circuit Court of Appeals for the Sixth Circuit, in a case arising in Tennessee, refused to follow the doctrine of the state courts, and, adhering to the rule of *Warnock v. Davis*,¹ held that an assignment to one without interest was invalid. This case was, however, reversed in *Grigsby v. Russell*, 222 U. S. 149, 32 Sup. Ct. 58, 56 L. Ed. 133, 36 L. R. A. (N. S.) 642, and the principle announced, that the holder of a valid policy of insurance upon his own life may, as a matter of financial necessity, make a valid assignment of the policy to a person having no insurable interest in the life of the insured in consideration of a small sum of money and an undertaking to pay the premiums due and to become due, and the assignee takes the entire interest in the policy, as against the personal representatives of the insured. It was further held that a clause that any claim against the company arising under any assignment of the policy shall be subject to proof of interest does not diminish the rights of an assignee with no insurable interest, as against the personal representatives of the insured, if there is no rule of law to that effect, and the company sees fit to pay. The court, after referring to the case of *Warnock v. Davis* and the peculiar facts of that case, says: "It is enough to say that, while the court below might hesitate to decide against the language of *Warnock v. Davis*, there has been no decision that precludes us from exercising our own judgment upon this much-debated point." It would seem that this decision should settle the rule in the federal courts in all cases where there is not an evident attempt to avoid the general rule as to wager contracts.

272. (l) Kansas

272 (l). The rule that the assignee of a life policy must have an insurable interest is reasserted in *Metropolitan Life Ins. Co. v. Elison*, 72 Kan. 199, 83 Pac. 410, 3 L. R. A. (N. S.) 934, 115 Am. St. Rep. 189, 7 Ann. Cas. 909.

272. (m) Texas

272 (m). An assignment of a life policy to one having no interest is invalid in Texas, except that the assignee may be reimbursed for amounts paid out by him (*Manhattan Life Ins. Co. v. Cohen* [Tex. Civ. App.] 139 S. W. 51).

¹ 104 U. S. 775, 26 L. Ed. 924.

273. (m) Other states holding interest to be necessary

273 (n). The rule that the assignee of a life policy must have an insurable interest in the life insured is adhered to in Kentucky and Virginia.

Bromley's Adm'r v. Washington Life Ins. Co., 122 Ky. 402, 92 S. W. 17, 5 L. R. A. (N. S.) 747, 121 Am. St. Rep. 467, 12 Ann. Cas. 685; *Bramblett v. Hargis' Ex'r*, 123 Ky. 141, 94 S. W. 20; *Smith v. Agnew*, 137 Ky. 83, 122 S. W. 231; *Hess' Adm'r v. Segenfelter*, 127 Ky. 348, 105 S. W. 476, 32 Ky. Law Rep. 225, 14 L. R. A. (N. S.) 1172, 128 Am. St. Rep. 343. See, also, *Irons v. United States Life Ins. Co.*, 128 Ky. 640, 108 S. W. 904, 129 Am. St. Rep. 318, construing Ky. St. 1903, § 678, relating to assessment insurance; *Equitable Life Assur. Society v. O'Connor's Adm'r*, 162 Ky. 262, 172 S. W. 496; *O'Connor's Adm'r v. Equitable Life Assur. Society of United States*, 186 S. W. 502, 170 Ky. 715; *Metropolitan Life Ins. Co. v. Nelson*, 186 S. W. 520, 170 Ky. 674, L. R. A. 1916F, 457; *Crismond's Adm'r v. Jones*, 117 Va. 34, 83 S. E. 1045, Ann. Cas. 1917C, 155.

In North Carolina the rule is qualified by the provision that the assignment is valid if in good faith and not a cover for a wagering transaction (*Hardy v. Aetna Life Ins. Co.*, 153 N. C. 286, 67 S. E. 767).

273-275. (o) Good faith—Payment of premiums

273 (o). That the assignment must be in good faith and not merely a colorable evasion of the rule against wagering contracts is conceded, even in those jurisdictions which hold that insurable interest of the assignee is unnecessary.

Reference may be made to the following cases: *Page v. Metropolitan Life Ins. Co.*, 98 Ark. 340, 135 S. W. 911; *McRae v. Warmack*, 98 Ark. 52, 135 S. W. 807, 33 L. R. A. (N. S.) 949; *Quillian v. Johnson*, 49 S. E. 801, 122 Ga. 49; *Volunteer State Life Ins. Co. v. Buchannan*, 10 Ga. App. 255, 73 S. E. 602; *Rylander v. Allen*, 125 Ga. 206, 53 S. E. 1032, 6 L. R. A. (N. S.) 128, 5 Ann. Cas. 355; *Evans v. Moore*, 28 Ohio Cir. Ct. R. 1. And see *Hardy v. Aetna Life Ins. Co.*, 153 N. C. 286, 67 S. E. 767; *Johnson v. Mutual Ben. Life Ins. Co.*, 157 N. C. 106, 72 S. E. 847.

But see *Harrison's Adm'r v. Northwestern Mut. Life Ins. Co.*, 78 Vt. 473, 63 Atl. 321, 112 Am. St. Rep. 932, where apparently it is regarded as immaterial that the policy was taken out solely for the purposes of the assignment.

274 (o). In some instances it has been regarded as important, as determining the character of the transaction as a wagering contract

or as one made in good faith, whether the premiums were paid by the insured or by the assignee.

Reference may be made to *McRae v. Warmack*, 98 Ark. 52, 135 S. W. 807, 33 L. R. A. (N. S.) 949; *Smith v. Agnew*, 137 Ky. 83, 122 S. W. 231; *Bendet v. Ellis*, 120 Tenn. 277, 111 S. W. 795, 18 L. R. A. (N. S.) 114, 127 Am. St. Rep. 1000.

3. WHAT CONSTITUTES AN INSURABLE INTEREST IN HUMAN LIFE OR HEALTH

279. (a) General principles

279 (a). One having an interest in the continuance of a certain life and an expectation of benefit to arise therefrom, whether founded on a contractual relation or upon blood or affinity, has an insurable interest in that life.

Northwestern Mutual Life Ins. Co. v. Coshoccon Glass Co., 31 Ohio Cir. Ct. R. 665; *McFarlane v. Robertson*, 137 Ga. 132, 73 S. E. 490. And see *Baltimore Life Ins. Co. v. Floyd*, 5 Boyce (Del.) 201, 91 Atl. 653; *Smith v. Agnew*, 137 Ky. 83, 122 S. W. 231.

279-281. (b) Interest based on relationship—Pecuniary interest not necessary

280 (b). Where the relationship of beneficiaries in an insurance policy to the insured is, as in the case of a husband and wife, parent and child, sister and brother, so close as to preclude the probability that mercenary motives would induce the sacrifice of life to gain the insurance, the element of pecuniary interest is not essential to the validity of the policy.

Hess' Adm'r v. Segenfelter, 127 Ky. 348, 105 S. W. 476, 14 L. R. A. (N. S.) 1172, 128 Am. St. Rep. 343; *McFarlane v. Robertson*, 137 Ga. 132, 73 S. E. 490. And see *Hahn v. Supreme Lodge of the Pathfinder*, 136 Ky. 823, 125 S. W. 259, holding blood relationship sufficient in itself to give an insurable interest.

"Insurable interest," dependent upon the relationship of the parties, must be such as will justify a reasonable expectation of advantage, to the party obtaining the insurance, from the continuance of the insured life (*Western & Southern Life Ins. Co. v. Webster*, 189 S. W. 429, 172 Ky. 444, L. R. A. 1917B, 375, Ann. Cas. 1917C, 271).

281-282. (c) Relationship insufficient—Pecuniary interest necessary

281 (c). Mere relationship is not sufficient to give an insurable interest. Such an interest exists, however, when there is a reasonable probability that one will gain by the other's continuance in life or lose by his death (*State v. Willett*, 171 Ind. 296, 86 N. E. 68, 23 L. R. A. [N. S.] 197).

282-283. (d) Same—Nature of pecuniary interest

282 (d). An interest arising out of a contractual relation is such a pecuniary interest as will constitute an insurable interest (*Northwestern Mut. Life Ins. Co. v. Coshoccon Glass Co.*, 31 Ohio Cir. Ct. R. 665). For example, a beneficiary, who had taken care of insured for three years at an average cost of \$15 per month, under an agreement that insured would bequeath her his life insurance, had an insurable interest (*District Grand Lodge, No. 23, United Order of Odd Fellows, v. Hill*, 3 Ala. App. 483, 57 South. 147). Nevertheless, it is not essential that the pecuniary interest should be definite, or such as is recognized and enforceable by law. A moral, as distinguished from a legal, obligation resting on insured to render a pecuniary benefit or advantage to an assignee of certain life policies, was sufficient to confer on such assignee an insurable interest (*Kopetovske v. Mutual Life Ins. Co. of New York*, 187 Fed. 499, 111 C. C. A. 265).

284-286. (f) Husband and wife

285 (f). The general rule is well settled that a husband or wife has an insurable interest in the life of the other.

In re Cohen (D. C.) 230 Fed. 733; *Marquet v. Aetna Life Ins. Co.*, 128 Tenn. 213, 159 S. W. 733, L. R. A. 1915B, 749, Ann. Cas. 1915B, 677; *Knights of the Modern Maccabees v. Sharp*, 163 Mich. 449, 128 N. W. 786, 33 L. R. A. (N. S.) 780; *Lewis v. Palmer*, 106 Va. 522, 56 S. E. 341. See also *Begley v. Miller*, 137 Ill. App. 278.

A divorced husband has no insurable interest in the life of his former wife (*Lawson v. United Benev. Ass'n* [Tex. Civ. App.] 185 S. W. 976).

286-287. (g) Same—Illegal marriage

286 (g). It has been held in Maryland (*Meinhardt v. Meinhardt*, 117 Md. 426, 83 Atl. 715) that a contract of insurance in a company operating on the mutual or co-operative plan may be made payable

to one with whom insured lived illicitly on separation from his wife, though the beneficiary be designated as "wife," as well as by name, and the lawful wife survives insured. So, too, in *Brogi v. Brogi*, 211 Mass. 512, 98 N. E. 573, it was said that the Massachusetts courts will not hold invalid a life policy naming as beneficiary and as insured's wife one to whom insured was married under ceremonies valid everywhere, except in Massachusetts. Both of these cases, however, probably fall within the rule that insurance taken out by the insured for the benefit of another is valid, irrespective of the interest of the beneficiary. However, it has been held in Kentucky that, where a man and woman live together as husband and wife, either has an insurable interest in the life of the other, irrespective of whether there is a valid marriage (*Western & Southern Life Ins. Co. v. Webster*, 189 S. W. 429, 172 Ky. 444, L. R. A. 1917B, 375, Ann. Cas. 1917C, 271).

287-288. (h) Parent and child

287 (h). The general rule that the relationship between parent and child is in itself sufficient to give either an insurable interest is approved in several jurisdictions.

In re Cohen (D. C.) 230 Fed. 733; *Woods v. Woods' Adm'r*, 130 Ky. 162, 113 S. W. 79, 19 L. R. A. (N. S.) 233; *Neal's Adm'r v. Shirley's Adm'r*, 127 S. W. 471, 137 Ky. 818; *Crismond's Adm'r v. Jones*, 117 Va. 34, 83 S. E. 1045, Ann. Cas. 1917C, 155. But in this case it was said that a son-in-law has no interest in the life of his father-in-law.

In Texas it is held that an illegitimate child has an insurable interest in the life of its father.

Maxey v. Franklin Life Ins. Co. (Tex. Civ. App.) 164 S. W. 438; *Overton v. Colored Knight of Pythias* (Tex. Civ. App.) 173 S. W. 472.

288 (h). It has been held in Indiana (*New York Life Ins. Co. v. Greenlee*, 42 Ind. App. 82, 84 N. E. 1101), following the general rule in that state, that, though a son has no insurable interest in the life of his father because of such relationship, the father may insure his life for the benefit of the son. In *Schwerdt v. Schwerdt*, 235 Ill. 386, 85 N. E. 613, it was held that an agreement between father and son that the son should insure the life of his mother and support his father for life out of the proceeds of the policy, the son otherwise not having an insurable interest in his mother's life, did not vest in him the insurable interest in her life which the father had.

289-290. (j) Brothers and sisters

289 (j). Following the general rule, recognized in Kentucky, that blood relationship is in itself sufficient to give an insurable interest, it was held in *Hahn v. Supreme Lodge of the Pathfinder*, 136 Ky. 823, 125 S. W. 259, that the relationship between brothers is sufficient to give either an insurable interest in the life of the other. So in Pennsylvania it is held that a sister has an insurable interest in the life of her brother.

In re Phillips' Estate, 86 Atl. 289, 238 Pa. 423, 45 L. R. A. (N. S.) 982, Ann. Cas. 1914C, 282; *Lawler v. Home Life Ins. Co. of America*, 59 Pa. Super. Ct. 409; *Gaughan v. Same*, Id. 414.

In *Dewey v. Fleischer*, 129 Wis. 591, 109 N. W. 525, where plaintiff and her husband had loaned money to her brother, it was held that she had an insurable interest in her brother's life. But in *Newmore v. Western & Southern Life Ins. Co.*, 28 Ohio Cir. Ct. R. 669, it was held that one who takes out a policy of insurance on the life of his brother without the knowledge of the latter, and for the avowed purpose of providing for the funeral expenses of the insured, who is indigent, but who is young and in good health, has no such insurable interest in the life of the insured as would enable him to maintain an action against the company to reform the contract of insurance, incorrectly made out by the company's agent, and to recover from the company the amount of the policy on the death of the insured.

290 (j). The sufficiency of the relationship to support an insurable interest is denied in Missouri (*Locher v. Kuechenmiester*, 98 S. W. 92, 120 Mo. App. 701).

290-291. (k) Other relationships

290 (k). The relationships of uncle or aunt and nephew or niece will not support an insurable interest.

McRae v. Warmack, 98 Ark. 52, 135 S. W. 807, 33 L. R. A. (N. S.) 949; *W. A. Doody Co. v. Green*, 62 S. E. 984, 131 Ga. 568; *McFarlane v. Robertson*, 137 Ga. 132, 73 S. E. 490; *Metropolitan Life Ins. Co. v. Ellison*, 83 Pac. 410, 72 Kan. 199, 3 L. R. A. (N. S.) 934, 115 Am. St. Rep. 189, 7 Ann. Cas. 909; *Hull v. Grand Lodge A. O. U. W.*, 105 S. W. 479, 32 Ky. Law Rep. 212; *Equitable Life Assur. Society v. O'Connor's Adm'r*, 162 Ky. 262, 172 S. W. 496; *Deal v. Hainley*, 116 S. W. 1, 135 Mo. App. 507; *Hardy v. Aetna Life Ins. Co.*, 67 S. E. 767, 152 N. C. 286.

There should be shown in such instances other facts which tend to rebut the presumption of a wagering contract (*Hardy v. Aetna Life Ins. Co.*, 154 N. C. 430, 70 S. E. 828), or which tend to prove a reasonable ground of expectation of pecuniary benefit.

McRae v. Warmack, 98 Ark. 52, 135 S. W. 807, 33 L. R. A. (N. S.) 949;
McFarlane v. Robertson, 137 Ga. 132, 73 S. E. 490.

Thus, where a man and wife took the 17 year old nephew of the wife into their family to care for and educate him, where he pursued his studies at their home under the instruction of the husband who was a practicing physician, and the nephew lived with them for two months before taking out life insurance in favor of the wife and for a number of months thereafter, the wife had an insurable interest in the nephew's life (*Mohr v. Prudential Ins. Co. of America*, 32 R. I. 177, 78 Atl. 554).

The relationship of cousins does not create an insurable interest, according to *Ryan v. Metropolitan Life Ins. Co.*, 93 S. W. 347, 117 Mo. App. 688, and *Hess' Adm'r v. Segenfelder*, 105 S. W. 476, 127 Ky. 348, 32 Ky. Law Rep. 225, 14 L. R. A. (N. S.) 1172, 128 Am. St. Rep. 343.

Relationship by affinity merely as that of brother-in-law, mother-in-law, etc., will not give an insurable interest, according to *American Mut. Life Ins. Co. v. Mead*, 39 Ind. App. 215, 79 N. E. 526; *Chandler v. Mutual Life & Industrial Ass'n of Georgia*, 61 S. E. 1036, 131 Ga. 82; *Crismond's Adm'r v. Jones*, 117 Va. 34, 83 S. E. 1045.

291-293. (1) Third persons other than relatives or creditors

292 (1). The official undertakers of an association, whose business was to insure to each of its members a sum to defray his funeral expenses and who through the profits they received from the sale of supplies were the sole beneficiaries under the contracts between the association and its members, had no insurable interest in the members' lives (*State v. Willett*, 171 Ind. 296, 86 N. E. 68, 23 L. R. A. [N. S.] 197).

On the other hand, it has been held that one to whom insured assigns the policy on his life, with the intention that she shall become on his death the custodian of his minor children, has, under such circumstances, an insurable interest in his life (*Matlock v. Bledsoe*, 90 S. W. 848, 77 Ark. 60). And in Alabama it has been held that where, at the time a person was made a beneficiary upon a policy of life insurance, she had cared for the insured for three years at an average cost of \$15 a month, under an agreement that he would

will her his life insurance, she had such an insurable interest as will render untenable an objection that the certificate was void in its inception as a wager policy (*District Grand Lodge No. 23, United Order of Odd Fellows in America, v. Hill*, 3 Ala. App. 483, 57 South. 147). Where a beneficiary in a life policy, stipulating that the beneficiary must have something more than a pecuniary interest in insured, took insured from an orphan asylum and supported her, and on her death took charge of the funeral and insured looked on the beneficiary as her guardian, the beneficiary had an insurable interest (*Thomas v. National Benefit Ass'n*, 84 N. J. Law, 281, 86 Atl. 375, 46 L. R. A. [N. S.] 779, affirming judgment 79 Atl. 1042, 81 N. J. Law, 349).

294-296. (n) Business connections—Creditors

294 (n). It is a well-recognized principle that a creditor has an insurable interest in the life of his debtor.

Peoria Life Ass'n v. Hines, 132 Ill. App. 642; *Metropolitan Life Ins. Co. v. Nelson*, 186 S. W. 520, 170 Ky. 674, L. R. A. 1916F, 457; *Morrow v. National Life Ass'n of Des Moines, Iowa*, 184 Mo. App. 308, 188 S. W. 881; *Reed v. Provident Sav. Life Assur. Soc.*, 190 N. Y. 111, 82 N. E. 734, modifying judgment in 112 App. Div. 922, 98 N. Y. Supp. 1111; *Dewey v. Fleischer*, 129 Wis. 591, 109 N. W. 525.

295 (n). In order that one may have an insurable interest as creditor, there must be a real debt existing. Thus, it has been held that the purchase of a policy on the life of another, in the absence of an existing debt at the time of the purchase, does not constitute the purchaser a creditor within the rule (*Taussig v. United Security Life Ins. & Trust Co.*, 231 Pa. 16, 79 Atl. 810). However, a debt to which the bar of the statute of limitations might be applied is sufficient to vest in a creditor an insurable interest in the life of his debtor (*Chicago Title & Trust Co. v. Haxtun*, 129 Ill. App. 626).

296 (n). Notwithstanding the general rule that a creditor has an insurable interest in the life of his debtor, statutory provisions may so affect the rights of creditors as to deprive them of this interest in the case of mutual benefit associations. Thus, it has been held that, under Laws N. H. 1895, p. 444, c. 86, § 10, providing that the money or other benefit paid by a fraternal beneficiary society cannot be taken to pay the member's debts, his creditors have no insurable interest in his life (*Supreme Commandery, U. O. G. C., v.*

Donaghey, 75 N. H. 197, 72 Atl. 419). On the other hand, it has been held in West Virginia that the rule that a creditor has an insurable interest in the life of his debtor applies to contracts of mutual benefit societies, in the absence of some controlling prohibition (*Chambers v. Great State Council, I. O. R. M.*, 76 W. Va. 614, 86 S. E. 467).

296-297. (o) Same—Partners

297 (o). Not only has a partner an insurable interest in the life of his partner (*Rush v. Howkins*, 135 Ga. 128, 68 S. E. 1035), but a copartnership has an insurable interest in the life of a partner (*Rahders, Merritt & Hagler v. People's Bank*, 113 Minn. 496, 130 N. W. 16, Ann. Cas. 1912A, 299). In the last case it was also held that an insurance policy, issued on the life of a member of a firm, may be assigned by the firm to a corporation organized to carry on the business.

297. (p) Same—Sureties and other business relations

297 (p). While it is true that a corporation has no insurable interest in the life of a stockholder or director as such (*Security Mut. Life Ins. Co. v. J. M. Schott & Sons Co.*, 30 Ohio Cir. Ct. R. 656), yet conditions may exist under which such relation will afford a basis for an insurable interest (*Northwestern Mut. Life Ins. Co. v. Coshocton Glass Co.*, 31 Ohio Cir. Ct. R. 665). Thus where a corporation has a pecuniary interest in a continuance of the life of one of its stockholders, who is an officer of the corporation, due to the fact that he alone has full knowledge of the business and is experienced in its management, and is giving his whole time to its superintendence, and the corporation is able to obtain credit because of his relation thereto, an insurable interest exists, sufficient to support a policy otherwise in good faith.

Northwestern Mut. Life Ins. Co. v. Coshocton Glass Co., 31 Ohio Cir. Ct. R. 665; *Coshocton Glass Co. v. Northwestern Mut. Life Ins. Co.*, 31 Ohio Cir. Ct. R. 675; *Keckley v. Coshocton Glass Co.*, 86 Ohio St. 213, 99 N. E. 299, Ann. Cas. 1913D, 607.

So, too, it has been held that a corporation has an insurable interest in the life of its president, general manager, and principal incorporator.

Mutual Life Ins. Co. of New York v. Board, Armstrong & Co. Corporation, 80 S. E. 565, 115 Va. 836, L. R. A. 1915F, 979; *Same v. Board Motor Truck Co. Corporation*, 80 S. E. 567, 115 Va. 843.

A trust company had an insurable interest in life of a manager of a department who was also a director and who received one-half of department profits as compensation (*American Trust Co. v. Life Ins. Co. of Virginia*, 173 N. C. 558, 92 S. E. 706).

4. WAGER POLICIES AND RIGHTS DEPENDENT ON EXTENT OF INTEREST

299-300. (b) Wager policies in general

299 (b). As one who has no insurable interest cannot take out a policy on the life of another, even with the consent of the insured (*Western & Southern Life Ins. Co. v. Grimes*, Adm'r, 138 Ky. 338, 128 S. W. 65), if a person insures his life on the inducement of the beneficiary, who has no insurable interest, the contract is speculative and void as a wager policy.

Western & Southern Life Ins. Co. v. Grimes Adm'r, 138 Ky. 338, 128 S. W. 65; *Deal v. Hainley*, 135 Mo. App. 507, 116 S. W. 1.

So, too, where insurance policies were procured by false and fraudulent representations of the beneficiaries and the insured that the former were creditors of the latter, the transaction constituted a speculation upon the hazard of human life, which rendered the policies void as against public policy (*Griffin's Adm'r v. Equitable Assur. Soc.*, 84 S. W. 1164, 119 Ky. 856, 27 Ky. Law Rep. 313). And in Louisiana, where the Code (Civ. Code, art. 1481) declares that persons who have lived together in open concubinage are respectively incapable of making to each other any donation of immovables, and, if they make a donation of movables, it cannot exceed one-tenth part of the whole value of their estate, a life insurance policy, taken out by a married man, payable to a woman with whom he had sustained illicit relations, was invalid, as to her, to the extent of nine-tenths of the policy (*New York Life Ins. Co. v. Neal*, 38 South. 485, 114 La. 652).

On the other hand, it has been held in Massachusetts that where plaintiff procured a policy of insurance on the life of another for the benefit of the daughter of the insured, and there was no evidence that plaintiff was to receive any benefit, direct or indirect, from the transaction, the policy was not a wagering policy as a matter of law (*McCann v. Metropolitan Life Ins. Co.*, 58 N. E. 1026, 177 Mass. 280). And even where the plaintiff was to keep

the policies in force until insured's death by paying all premiums, and from the proceeds was to be reimbursed his advances of premiums, with interest on his payments, and be paid a substantial sum in addition, the fact that one of several policies obtained pursuant to the agreement was made payable to plaintiff alone did not affect the insurable interest (*Reed v. Provident Sav. Life Assur. Soc. of New York*, 82 N. E. 734, 190 N. Y. 111, modifying judgment 112 App. Div. 922, 98 N. Y. Supp. 1111).

300-301. (c) Same—Rights of parties

300 (c). Where a policy is speculative, in that it is taken by one who has no insurable interest, on the inducement of one having no interest, the beneficiary paying the premiums, the beneficiary is entitled to only so much of the proceeds of the policy as will satisfy the lawful demands which he may have against the estate of the insured.

Deal v. Hainley, 135 Mo. App. 507, 116 S. W. 1; *Sage v. Finney*, 156 Mo. App. 30, 135 S. W. 996.

301-302. (d) Creditors' policies

301 (d). One who has advanced money to the insured has an insurable interest as creditor, upon which a subsequent policy may be based, notwithstanding his interest is less than the amount of the policy, and he is entitled to payment of his debt from the proceeds of the insurance (*Reed v. Provident Sav. Life Assur. Soc. of New York*, 82 N. E. 734, 190 N. Y. 111, modifying judgment 112 App. Div. 922, 98 N. Y. Supp. 1111). So, it was held in *Morrow v. National Life Ass'n of Des Moines, Iowa*, 184 Mo. App. 308, 168 S. W. 881, that a life policy, made payable to one designated as "creditor," without any provision as to payment of any balance, is not void as a wagering policy because the debt is less than the face of the policy, but is for the benefit of the creditor for the amount of his debt, and for the benefit of insured's estate for the balance. And such policy is not void because of the debtor being insolvent, and there being no reasonable expectation of his becoming solvent so as to pay the debt. So, too, an agreement between a creditor and his debtor, whereby the creditor agrees to make an additional loan and the debtor to take out life insurance, and transfer it to the creditor in payment of the existing debt and of the loan, the creditor to pay all premiums, is valid, and makes the creditor the owner of the po:-

icy and entitled to its proceeds, provided the transaction is in good faith, and the value of the policy not so disproportionate with the amount of the debt and loan as to constitute a mere wager (*Lake v. New York Life Ins. Co.*, 45 South. 959, 120 La. 971). But the mere purchase by a creditor of a policy on the life of the debtor, in the absence of such debt, entitles the creditor, upon insured's death, to retain from the proceeds of the policy only such premiums and payments as were made by the creditor on account of the policy; the purchase being otherwise a wagering contract, and unlawful (*Taussig v. United Security Life Ins. & Trust Co.*, 79 Atl. 810, 231 Pa. 16).

306-308. (g) Assignment without interest or as security

306 (g). The validity of a policy, as against objection that the assignment was an evasion of prohibition against issuance of policies to beneficiaries having no insurable interest, must be determined by the contract between insured and beneficiary prior to or at time of issuance of the policy, and any subsequent agreement between insured and beneficiary cannot affect rights of insurer (*O'Connor's Adm'r v. Equitable Life Assur. Society of United States*, 186 S. W. 502, 170 Ky. 715). A life policy may of course be lawfully assigned as security for a debt of the assured, though the creditor has no insurable interest in his life (*Tripp v. Jordan*, 177 Mo. App. 339, 164 S. W. 158).

308-310. (h) Same—Rights of parties

308 (h). In those states where it is held that the assignee of a life policy must have an insurable interest, it seems also to be the rule that an assignment to one without interest is absolutely void, giving the assignee no right in the proceeds.

Reference may be made to *McRae v. Warmack*, 98 Ark. 52, 135 S. W. 807, 33 L. R. A. (N. S.) 949; *Metropolitan Life Ins. Co. v. Ellison*, 83 Pac. 410, 72 Kan. 199, 3 L. R. A. (N. S.) 934, 115 Am. St. Rep. 189, 7 Ann. Cas. 909; *Bromley's Adm'r v. Washington Life Ins. Co.*, 92 S. W. 17, 122 Ky. 402, 28 Ky. Law Rep. 1300, 5 L. R. A. (N. S.) 747, 121 Am. St. Rep. 467, 12 Ann. Cas. 685; *Smith v. Agnew*, 137 Ky. 83, 122 S. W. 231.

Even in these jurisdictions, however, if he is a creditor, he can participate in the proceeds to the extent of the indebtedness, but not as to a debt which did not enter into the assignment (*Bramblett*

v. Hargis' Ex'x, 123 Ky. 141, 94 S. W. 20). As to any part of the proceeds over and above the debt, the creditor holds them as trustee for the beneficiaries named in the policy (*Irons v. United States Life Ins. Co.*, 128 Ky. 640, 108 S. W. 904, 129 Am. St. Rep. 318). Generally, however, it is held that the assignment of a life policy to one without an insurable interest in the life insured is valid to the extent of reimbursing the assignee for any amounts expended by him in behalf of the policy with interest thereon.

Reference may be made to *Quillian v. Johnson*, 49 S. E. 801, 122 Ga. 49; *Locke v. Bowman*, 151 S. W. 468, 168 Mo. App. 121; *Bendet v. Ellis*, 120 Tenn. 277, 111 S. W. 795, 18 L. R. A. (N. S.) 114, 127 Am. St. Rep. 1000; *Manhattan Life Ins. Co. v. Cohen* (Tex. Civ. App.) 139 S. W. 51. Compare *Deal v. Hainley*, 116 S. W. 1, 135 Mo. App. 507. See, also, *Woods v. Woods' Adm'r*, 130 Ky. 162, 113 S. W. 79, 19 L. R. A. (N. S.) 233, holding that, where a mother contracted with her sons to pay premiums on her life policy and take the proceeds at her death, an agreement between the sons and a nephew of insured, who had no insurable interest, that he should furnish one-third of the premiums and have one-third of the proceeds of the policy did not affect the validity of the policy or affect the sons' interest therein.

5. EXTINGUISHMENT OF INSURABLE INTEREST IN HUMAN LIFE

310-312. (a) General principles

311 (a). A designation of a beneficiary, valid in its inception, remains so, although the insurable interest or relationship of the beneficiary has ceased, unless otherwise stipulated in the contract (*Caldwell v. Grand Lodge of United Workmen of California*, 82 Pac. 781, 148 Cal. 195, 2 L. R. A. [N. S.] 653, 113 Am. St. Rep. 219, 7 Ann. Cas. 356).

312-314. (b) Policy payable to wife—Effect of divorce

312 (b). In some jurisdictions it is held that a wife, on being divorced, ceases to have any interest as beneficiary in a policy on the husband's life.

Giffin v. Grand Lodge of Ancient Order of United Workmen of Nebraska, 157 N. W. 113, 99 Neb. 589, L. R. A. 1916D, 1168; *Northwestern Mut. Life Ins. Co. v. Whiteselle* (Tex. Civ. App.) 188 S. W. 22.

But a contrary rule prevails in other jurisdictions.

Marquet v. Aetna Life Ins. Co., 128 Tenn. 213, 150 S. W. 733, L. R. A. 1915B, 749, Ann. Cas. 1915B, 677; *Humphrey v. Mutual Life Ins. Co. of New York*, 151 Pac. 100, 86 Wash. 672.

It has been held in Illinois that the fact that a decree of divorce orders the husband to pay the wife alimony gives her an insurable interest in his life which will continue at least during the time the alimony is payable under the decree (*Begley v. Miller*, 137 Ill. App. 278). In *Western & Southern Life Ins. Co. v. Webster*, 172 Ky. 444, 189 S. W. 429, L. R. A. 1917B, 375, Ann. Cas. 1917C, 271, it was held that where a woman, living with a man as his wife under a formal but illegal marriage, had him procure a policy on his life containing a change of beneficiary clause and she paid the premiums therefor, a judgment annulling her marriage as void ab initio terminated her insurable interest in his life. And it was said, also, that where a woman, after the termination of her insurable interest by divorce, continued until his death to pay premiums on a policy on his life in which she had been beneficiary, she was entitled, on his death, to recover only the premiums paid with interest.

316-317. (f) Particular applications of the rule

316 (f). Though a firm has an insurable interest in the life of a partner devoting his skill, knowledge, and experience in the firm business, yet interest in a policy on the life of a partner held by the firm ceases on the dissolution of the firm, and the surviving partner has no interest (*Ruth v. Flynn*, 26 Colo. App. 171, 142 Pac. 194).

6. PLEADING AND PRACTICE IN RELATION TO INSURABLE INTEREST IN LIFE

317-319. (a) Pleading insurable interest

317 (a). In jurisdictions in which it is held that the assignee of a life policy must have an insurable interest, the assignee, or one claiming under him, must allege and prove facts showing an insurable interest; there being no presumption that the assignee had an insurable interest in the life sufficient to sustain the assignment (*Troy v. London*, 39 South. 713, 145 Ala. 280).

Under the rule that facts must be stated from which an insurable interest may be inferred as a matter of law an allegation, in an ac-

tion on a benefit certificate, that persons named were the only heirs of the deceased member of the order which had issued the certificate, though somewhat indefinite, is a sufficient allegation of their interest, in the absence of any objection in the trial court (*Wait v. Mystic Workers of the World*, 140 Iowa, 648, 119 N. W. 72).

320-323. (c) Estoppel to deny interest

321 (c). In accordance with the general rule that an insurer issuing a policy and accepting premiums with knowledge of all the facts regarding the interest of the beneficiary is estopped to deny the insurable interest of such beneficiary it has been held in New Jersey (*Thomas v. National Ben. Ass'n*, 81 N. J. Law, 349, 79 Atl. 1042), that where a contract of life insurance describes the beneficiary as "guardian," and provides the beneficiary must have something more than a pecuniary interest in the insured, as speculative policies are not issued by the association, the issuance of the policy and receipt of the premiums by the company amounted to an interpretation of the policy by the parties precluding insurer from avoiding the policy because of lack of insurable interest of the beneficiary.

322 (c). The rule that the incontestable clause does not estop the company from setting up the defense that the policy is void because of lack of insurable interest is approved in Kentucky (*Bromley's Adm'r v. Washington Life Ins. Co.*, 92 S. W. 17, 122 Ky. 402, 28 Ky. Law Rep. 1300, 5 L. R. A. [N. S.] 747, 121 Am. St. Rep. 467, 12 Ann. Cas. 685).

323. (d) Same—Estoppel of beneficiary

323 (d). In *Chicago Title & Trust Co. v. Haxtun*, 129 Ill. App. 626, the Illinois Appellate Court laid down the general rule that no one but the insurer is entitled to interpose a defense of a lack of insurable interest in the beneficiary named in a policy. So, too, in *Keckley v. Coshocton Glass Co.*, 86 Ohio St. 213, 99 N. E. 299, Ann. Cas. 1913D, 607, it was held that, where an insurer under a life policy makes no defense and pays the money into court, parties claiming an interest in the fund will not be allowed to object that the beneficiary named in the policy had no insurable interest.

323-324. (e) Pleading lack of insurable interest

323 (e). Want of insurable interest in the plaintiffs in an action on a policy must be specially pleaded and cannot be shown under

a general denial (*Keeton v. National Union*, 178 Mo. App. 301, 165 S. W. 1107).

325-326. (f) Evidence—Presumptions and burden of proof

325 (f). In an action on a life policy, if the answer denies plaintiff's insurable interest, the burden is upon her to prove such interest (*Lawson v. Hotchkiss*, 125 N. Y. Supp. 261, 140 App. Div. 297). So, too, if the policy shows a relationship not creating an insurable interest, the burden is on the beneficiary to show that he had a pecuniary interest which gave him the right to insurance (*Ryan v. Metropolitan Life Ins. Co.*, 93 S. W. 347, 117 Mo. App. 688).

326-328. (g) Same—Admissibility and sufficiency

327 (g). As tending to show the interest of the beneficiary, evidence that the beneficiary who was no relation to the insured, upon his request and promise to will her his life insurance, moved into his house and cared for him until his death, and that, in pursuance to such agreement, he did in fact surrender an existing policy, and had a new one issued with her as beneficiary, was relevant (*District Grand Lodge No. 23, United Order of Odd Fellows in America, v. Hill*, 3 Ala. App. 483, 57 South. 147).

On the issue as to whether the policy was a wagering contract, it was proper to exclude the testimony of the agent of the insurance company, through whom the application for the policy was made, to the effect that he disapproved the policy because in his opinion it was a wager policy, and in also rejecting the testimony that in the town where the insured lived there was a great deal of speculation in policies of insurance (*Volunteer State Life Ins. Co. v. Buchanan*, 10 Ga. App. 255, 73 S. E. 602).

328 (g). Where a creditor insured the life of his debtor to secure the payment of a debt, a bond as evidence of the debt, executed by the debtor a few days after the taking of the insurance, for the same amount as the policy, which has not been impeached, is prima facie evidence of the creditor's insurable interest in the life of his debtor (*Woody's Adm'r v. Schaff*, 56 S. E. 807, 106 Va. 799).

The sufficiency of the evidence to show an insurable interest was also considered in *Locher v. Kuechenmeister*, 120 Mo. App. 701, 98 S. W. 92.

328-329. (h) Questions for jury and instructions

328 (h). Whether a policy is a wagering contract is a question for the jury.

Reference may be made to *Volunteer State Life Ins. Co. v. Buchanan*, 10 Ga. App. 255, 73 S. E. 602; *Deal v. Hainley*, 116 S. W. 1, 135 Mo. App. 507; *Kopetovske v. Mutual Life Ins. Co. of New York*, 187 Fed. 499, 111 C. C. A. 265.

The propriety and sufficiency of instructions on the issue of insurable interest were considered in *McFarlane v. Robertson*, 137 Ga. 132, 73 S. E. 490, and *Mohr v. Prudential Ins. Co.*, 32 R. I. 177, 78 Atl. 554.

329 (h). In an action on a life policy by the beneficiary who was an aunt of the insured, the justice instructed that to find a verdict for plaintiff the jury should be satisfied that the policy was actually the contract of the insured, and not of plaintiff or her husband, or that the beneficiary had an insurable interest in the life of the insured. It was held that the verdict of the jury for plaintiff must be regarded either as a finding that the policy was the contract of insured, or as a finding that plaintiff had an insurable interest in his life (*Mohr v. Prudential Ins. Co. of America*, 32 R. I. 177, 78 Atl. 554).

IV. FORM AND REQUISITES OF THE CONTRACT

1. AGREEMENTS TO PROCURE INSURANCE AND LIABILITIES THEREUNDER

333-336. (b) Nature, requisites, and validity of agreement

335 (b). The direction of the owner of furniture to an insurance broker to take care of her insurance, and see that she was covered to a certain amount constituted the broker a general agent to keep her insured in such amount (*Ferrar v. Western Assur. Co.*, 159 Pac. 609, 30 Cal. App. 489, application for rehearing in Supreme Court denied 159 Pac. 611, 30 Cal. App. 489).

336-337. (c) Duties assumed under agreement

336 (c). While one contracting to procure insurance does not guarantee the financial condition of a company from which he obtains policies, he must use reasonable care, skill, and judgment, with a view to the security or indemnity for which insurance is sought (*Scharles v. N. Hubbard, Jr., & Co.*, 131 N. Y. Supp. 848, 74 Misc. Rep. 72). One agreeing to procure "forthwith" insurance on the building of another is entitled, before becoming liable for a breach, to a reasonable time within which to procure insurance (*Rainer v. Schulte*, 113 N. W. 396, 133 Wis. 130). Where loan brokers in making a mortgage on plaintiffs' property agreed to procure \$2,000 insurance for the benefit of the mortgagee in stock companies, it was their duty on ascertaining that only \$1,000 of such insurance could be procured to validate existing insurance on the property in mutual companies for the balance, in order to afford plaintiffs proper protection (*Gegare v. Fox River Land & Loan Co.*, 140 N. W. 305, 152 Wis. 548).

337 (c). Under an agreement to procure and keep in force insurance on property, it is the duty of the promisor to renew a policy on its expiration (*Georgia Home Ins. Co. v. Kelley* [Ky.] 113 S. W. 882), and if he fails through his own neglect to keep the property insured in a solvent company he is liable (*Diamond v. Duncan* [Tex. Civ. App.] 138 S. W. 429). If the agent agrees, in consideration of a stipulated sum per year, to keep the property insured for a specified number of years, he must, on the cancellation of one of

the policies, procure new insurance at his own expense (*Tanenbaum v. Federal Match Co.*, 102 App. Div. 520, 92 N. Y. Supp. 683).

340-341. (f) Nonperformance and excuses therefor—Inability to procure insurance

340 (f). It is the duty of the agent, in event of his inability to procure insurance in pursuance of the agreement, to notify the property owner without delay (*Russell v. O'Connor*, 120 Minn. 66, 139 N. W. 148).

341-343. (g) Nature and extent of liability

341 (g). One agreeing to procure insurance on the building of another, in consideration of the latter's agreeing to pay the premium therefor, is bound thereby, whether he had authority to represent and bind some unnamed insurer or insurance agent (*Rainer v. Schulte*, 113 N. W. 396, 133 Wis. 130). But in order to hold the promisor liable it must appear that the minds of the parties met on the subject-matter of the contract of insurance to be entered into and agreed on its terms (*Mooney v. Merriam*, 77 Kan. 305, 94 Pac. 263).

The promisor is not liable on his contract to procure insurance, on failure of the companies, which were unauthorized to do business in the state, to pay the loss, in respect to which contract he assumed to act by request, unless the insured was justified by his conduct, and had reasonable ground for believing that the companies in which the insurance was placed were duly authorized by the state (*Webster v. Ferguson*, 102 N. W. 213, 94 Minn. 86). To authorize the insured to recover against the promisor for damages sustained through his effecting invalid insurance, preventing the principal from recovering on a loss under the policy, he need not show that he has sued the insurance company; it being sufficient to show that the policy was void, and that the company refused to pay after receipt of due proofs of loss (*Scharles v. N. Hubbard, Jr., & Co.*, 131 N. Y. Supp. 848, 74 Misc. Rep. 72).

Where an insurance broker undertook to keep properties insured and after expiration of the policies neglected to secure new policies for a period during which the property was destroyed by fire, he was liable for the loss (*Diamond v. Duncan*, 107 Tex. 256, 172 S. W. 1100, rehearing denied 107 Tex. 256, 177 S. W. 955). And though defendant did not solicit insured to give fire insurance, but merely placed it with unlicensed companies at insured's request, he

was nevertheless liable to insured for loss, companies having failed to pay (*Case v. Meany*, 165 Wis. 143, 161 N. W. 363).

While it is the duty of the agent to procure valid insurance, it is the duty of the insured to inform himself of the terms and conditions of the contract, and if, through his failure to do so, a forfeiture results, the insured cannot hold the agent liable on the theory that it was the agent's duty to inform him of the conditions which might, and in fact did, cause a forfeiture (*Fries-Breslin Co. v. Bergen*, 176 Fed. 76, 99 C. C. A. 384, affirming [C. C.] 168 Fed. 360). If, however, the policy furnished contains a false warranty, rendering it void, which fact would have been apparent to the agent, had he examined the policy when it was issued to him, he may be held liable (*Walker Stratman & Co. v. Black*, 216 Pa. 395, 65 Atl. 799). So, too, the agent may be held liable where he negligently fails to obtain a necessary vacancy permit (*Emery v. Lord*, 29 App. D. C. 589).

344. (i) Pleading and practice

344 (i). Where one agreed to procure "forthwith" insurance on the building of another, and the building on the morning of the second day thereafter was destroyed by fire, and no insurance had been procured, the question whether the delay in procuring the insurance was reasonable or not was for the jury (*Rainer v. Schulte*, 113 N. W. 396, 133 Wis. 130).

The sufficiency of the evidence to support a judgment for plaintiff in an action for breach of a contract to procure insurance was considered in *Gardner v. Hermann*, 116 Minn. 161, 133 N. W. 558.

2. GENERAL POWERS AND LIABILITIES OF AGENTS IN RESPECT OF THE CONTRACT

345-349. (b) Powers of agents in general

345 (b). The powers of agents of insurance companies are governed by the general law of agency (*Germania Life Ins. Co. v. Bouldin*, 100 Miss. 660, 56 South. 609). Prima facie the powers of an agent are coextensive with the business intrusted to him, and the company is bound by his acts within the scope of his real or apparent authority.

Shook v. Retail Hardware Mut. Fire Ins. Co., 154 Mo. App. 394, 134 S. W. 589; *Germania Life Ins. Co. v. Bouldin*, 100 Miss. 660,

56 South. 600; Delaware Ins. Co. of Philadelphia v. Hill (Tex. Civ. App.) 127 S. W. 283.

There is no distinction between mutual and stock companies as to responsibility for agents' acts in taking applications for insurance. *Blake v. Farmers' Mut. Lightning Protected Fire Ins. Co. of Michigan* (Mich.) 161 N. W. 890.

346 (b). In accordance with the foregoing general principle, it has been held that, where the secretary of a mutual fire insurance company was authorized to consent in writing to the mortgaging of an insured dwelling, he also had power to indorse on a policy insuring a dwelling a clause making a loss payable to a mortgagee (*Adams v. Farmers' Mut. Fire Ins. Co.*, 90 S. W. 747, 115 Mo. App. 21). So, too, where one is held out by the company to be a general agent, an insured dealing with him is not affected by limitations of his power of which the insured has no knowledge; but the insured may treat with the agent on the theory that he was a general agent with the power to fix the terms of contracts of insurance (*Sloss-Sheffield Steel & Iron Co. v. Aetna Life Ins. Co.*, 74 N. J. Eq. 635, 70 Atl. 380).

One having all the powers of an insurer within a specified locality, and authorized to appoint local agents is a "general agent," though his powers are not coextensive with those of insurer (*Porter v. General Acc. Fire & Life Assur. Corp.*, 157 Pac. 825, 30 Cal. App. 198). So an insurance agency company advertising as general agents of a fidelity insurance company, having its office in the same city as the headquarters of a corporation operating retail grocery stores, had authority to change a schedule bond of the grocery store corporation covering store managers from a bond requiring strict proof of fraud and dishonesty to one requiring proof only of a manager's merchandise shortage (*Co-operative Stores Co. v. United States Fidelity Guaranty Co.*, 137 Tenn. 609, 195 S. W. 177). The same rules as to the authority of general agents of surety companies that insure against loss from defaulting employes should be applied as are applied to fire and life insurance companies (*Crystal Ice Co. v. United Surety Co.*, 123 N. W. 619, 159 Mich. 102).

347 (b). The name by which an agent is designated does not necessarily indicate his powers. Thus, the word "supervisor," when used to indicate an agent of an insurance company, denotes general agency (*New York Life Ins. Co. v. Rhodes*, 60 S. E. 828, 4 Ga.

App. 25). Generally, an agent to whom blank policies are supplied, with power to issue and deliver policies may bind the company by a contract of insurance, in the absence of notice to insured that his authority is limited.

Sun Ins. Office of London v. Mitchell, 183 Ala. 420, 65 South. 143;
Rankin v. Northern Assur. Co. of Michigan, 98 Neb. 172, 152 N. W. 324; *Richard v. Springfield Fire & Marine Ins. Co.*, 38 South. 563, 114 La. 794, 69 L. R. A. 278, 108 Am. St. Rep. 359; *Austin Fire Ins. Co. v. Sayles* (Tex. Civ. App.) 157 S. W. 272.

Though life insurance agents do not have power to issue policies, they may generally bind the company by acts within the ordinary authority of an agent (*Thompson v. Michigan Mut. Life Ins. Co.*, 56 Ind. App. 502, 105 N. E. 780). But it was held in Tennessee that an agent of an insurance company, having ostensible general authority to solicit applications, make contracts for insurance, and receive first premiums, binds his principal by any acts or contracts within the general scope of his apparent authority, although in excess of his actual authority (*Independent Order of Foresters v. Cunningham*, 127 Tenn. 521, 156 S. W. 192).

An agent who has authority to issue policies may bind the company by a renewal contract (*Brown v. Home Ins. Co.*, 82 Kan. 442, 108 Pac. 824). Of course, if the insured had knowledge of limitations on the power of the agent, the company cannot be bound by the act of the agent in issuing a contract at an unauthorized rate (*Watrous v. Des Moines Ins. Co.*, 144 Iowa, 551, 123 N. W. 171). But it has been held in Nebraska that where a local agent has by agreement renewed a fire insurance policy from year to year, and such agreement has been acted on by the insurer, that insured knew that the agent had no authority to waive written conditions of a policy will not estop him to assert that the agent was authorized to so renew the policy (*Willson v. German American Ins. Co.*, 95 Neb. 774, 146 N. W. 945).

The terms of the appointment may limit the agent's authority. Thus a letter from insurance company appointing an agent, providing, "Policies will be written at this office," gives the agent no authority to make a contract of insurance (*Browne v. Commercial Union Assur. Co. of London, England*, 158 Pac. 765, 30 Cal. App. 547). And under a power of attorney whereby underwriters appointed three persons their attorneys in fact the grant of power

was joint and not several, and hence a policy issued by two only of the three did not bind the principal (*Unterberg v. Elder*, 105 N. E. 834, 211 N. Y. 499, Ann. Cas. 1915C, 616, reversing judgment 134 N. Y. Supp. 242, 149 App. Div. 647, and affirming judgment 130 N. Y. Supp. 166, 72 Misc. Rep. 363).

The fact that a standard fire policy contains the provision that in the matter relating to the insurance no person, unless duly authorized in writing, shall be deemed the agent of insurer, does not impose on insured the duty of showing that the agent issuing the policy had written authority to do so (*Gazzam v. German Union Fire Ins. Co.*, 71 S. E. 434, 155 N. C. 330, Ann. Cas. 1912C, 362).

348 (b). The authority to complete contracts primarily differentiates a general agent having power to bind his principal from mere soliciting agents and other intermediaries operating between the insured and the insurer, who have authority only to initiate contracts (*Browne v. Commercial Union Assur. Co. of London, England*, 158 Pac. 765, 30 Cal. App. 547). A mere soliciting agent for an insurance company has no power to bind the company.

National Union Fire Ins. Co. v. School Dist. No. 55, 122 Ark. 179, 182 S. W. 547, L. R. A. 1916D, 238; *Pettijohn v. St. Paul Fire & Marine Ins. Co.*, 100 Kan. 482, 164 Pac. 1096; *Knobel v. London Guarantee & Accident Co. (Sup.)* 163 N. Y. Supp. 977; *Dorman v. Connecticut Fire Ins. Co.*, 41 Okl. 509, 139 Pac. 262, 51 L. R. A. (N. S.) 873; *Phipps v. Union Mut. Ins. Co. (Okl.)* 150 Pac. 1083.

The soliciting agent of an insurance company may, however, bind his company as to matters within the restricted scope of his authority in the taking and preparation of an application for insurance.

Kring v. Globe Farmers' Town Mut. Fire, Tornado, Cyclone & Windstorm Ins. Co., of Rock Port, 195 Mo. App. 133, 189 S. W. 628; *Phipps v. Union Mut. Ins. Co. (Okl.)* 150 Pac. 1083; *Mutual Life Ins. Co. v. Summers*, 19 Wyo. 441, 120 Pac. 185.

349-350. (c) Same—Delegation of power

349 (c). A local agent has generally no authority to appoint another as agent of the company.

Reference may be made to *Mutual Life Ins. Co. v. Reynolds*, 81 Ark. 202, 98 S. W. 963; *Michigan Mut. Life Ins. Co. v. Thompson*, 44 Ind. App. 180, 86 N. E. 503; *Supreme Lodge, K. P. v. Connelly*, 185 Ala. 301, 64 South. 362.

But where a general agent of an insurance company employed a subagent as an "outside man" to solicit applications, receive premiums, and deliver policies, and he was the only man with whom the public came into contact, and, so far as the public could know, had full power to represent the company in all matters pertaining to insurance, a person who is induced by him to take insurance may, in the absence of notice to the contrary, regard him as an agent of the company, with authority to bind it (*Pelican Assur. Co. v. Schildknecht*, 108 S. W. 312, 128 Ky. 351). And it has been held that life insurance companies are responsible, not only for the acts of their agents within the scope of their agency, but for the acts of the agent's clerks, when the company knew or ought to have known that the agent necessarily employed assistants for the collection of premiums and delivery of policies (*Thompson v. Michigan Mut. Life Ins. Co.*, 56 Ind. App. 502, 105 N. E. 780). So, where a married woman was appointed general agent of a life insurance company, but her husband acted for her, with the knowledge of the officers of the company, he had the authority of a general agent (*Peck v. Washington Life Ins. Co.*, 74 N. E. 1122, 181 N. Y. 585, affirming 91 App. Div. 597, 87 N. Y. Supp. 210).

Where a fire insurance agent's clerk wrote a policy in the agent's absence, pursuant to his directions, and signed the agent's name, and accepted a portion of the premium, and the agent verbally ratified his acts, and accepted the balance of the premium before the loss, and delivered the policy, the company was liable (*Atlas Assur. Co., Limited, of London, v. Kettles*, 87 S. E. 1, 144 Ga. 306).

350-351. (d) Same—Distribution of risk

350 (d). Generally an insurance agent representing several companies may select or designate the company which shall take the particular risk application for which is made to him.

Costello v. Grant County Mutual Fire & Lightning Ins. Co., 133 Wis. 361, 113 N. W. 639; *Phoenix Ins. Co. v. State*, 76 Ark. 180, 88 S. W. 917, 6 Ann. Cas. 440.

351 (d). But an agent directed to renew insurance has no right to select another company to carry the risk without the knowledge and consent of the insured.

Ferguson v. Northern Assur. Co., 26 S. D. 346, 128 N. W. 125; *Costello v. Grant County Mut. Fire & Lightning Ins. Co.*, 133 Wis. 361, 113 N. W. 639.

So, where a person is the agent of two insurance companies, he cannot shift a part of the risk on a building insured by one of the companies, to the other company, without the knowledge and consent of the insured and without the consent of the second company (*Provident Life & Trust Co. v. Spring Garden Ins. Co.*, 53 Pa. Super. Ct. 66). But, where insurance agent is authorized by insured to keep his property covered, notice to agent of cancellation of policy authorizes him to substitute for the insured another policy (*Hollywood Lumber & Coal Co. v. Dubuque Fire & Marine Ins. Co.* [W. Va.] 92 S. E. 858). And it has been held that where a property owner contracted with an insurance agent to insure his property, and paid him the premium, the agent to keep the property insured, and where, after cancellation of two consecutive policies, the agent placed the insurance in defendant company and began to write the policy, but the property was destroyed by fire before it was finished, the agent's acts constituted a binding contract of insurance with defendant (*Wilson v. German-American Ins. Co.*, 133 Pac. 715, 90 Kan. 355).

351. (e) Same—Agency for both parties

351 (e). In accordance with the general rule of the law of agency that one cannot at the same time act as agent for persons having antagonistic interests, it is a general rule of insurance law that one cannot at the same time act as agent for the insurer and the insured.

Reference may be made to *Arispe Mercantile Co. v. Queen Ins. Co.*, 141 Iowa, 607, 120 N. W. 122, 133 Am. St. Rep. 180; *Liverpool & London & Globe Ins. Co. v. McCollum* (Tex. Civ. App.) 149 S. W. 775; *Todd v. German Am. Ins. Co.*, 2 Ga. App. 789, 59 S. E. 94; *Rockford Ins. Co. v. Winfield*, 57 Kan. 576, 47 Pac. 511.

It has, however, been said that the rule is subject to many exceptions (*Todd v. German-American Ins. Co.*, 2 Ga. App. 789, 59 S. E. 94). It must, of course, clearly appear that the person was the agent of both parties at the time the insurance was placed or that the agent of company had some interest in the property insured (*Zimmerman v. Ohio German Fire Ins. Co.*, 39 Pa. Super. Ct. 521). So, where one was merely an employé of the insured, but had no interest in the business and was not a creditor, a policy issued by him on the employer's property is issued as agent of the company, and is not open to the objection that he is acting in a dual relation

(*German Fire Ins. Co. v. Gibbs, Wilson & Co.*, 42 Tex. Civ. App. 407, 92 S. W. 1068, rehearing denied 42 Tex. Civ. App. 407, 96 S. W. 760). The fact that an agent for several insurance companies agreed with a property owner to hold the policy to be taken out and keep his property insured was not repugnant to the agent's duty to the defendant insurance company, and hence did not affect the validity of the insurance contract (*Wilson v. German-American Ins. Co.*, 133 Pac. 715, 90 Kan. 355). The company may by ratification or estoppel preclude itself from raising the objection. Thus where an insurance company, knowing or having reasonable ground to believe that its agent is acting for customers of the agency in applying for policies on their property, and without depending on the advice or loyalty of the agent in the transaction, but acting on its own judgment as to the desirability of the particular risks, authorizes the agent to write policies, it cannot complain that such local agent was also the agent of insured, and will be bound on the policy (*Todd v. German-American Ins. Co. of New York*, 59 S. E. 94, 2 Ga. App. 789).

351-352. (f) Same—To issue policy to himself

352 (f). An agent of an insurance company, with authority to act for it in contracting insurance, cannot issue a policy to himself on his own property unless the company with knowledge of the facts ratifies his act.

Arispe Mercantile Co. v. Queen Ins. Co., 141 Iowa, 607, 120 N. W. 122, 133 Am. St. Rep. 180; *Salene v. Queen City Ins. Co.*, 59 Or. 297, 116 Pac. 1114, 35 L. R. A. (N. S.) 438, Ann. Cas. 1916D, 1276; *Shamokin Mfg. Co. v. Ohio German Fire Ins. Co.*, 39 Pa. Super. Ct. 553; *Spring Garden Ins. Co. v. Wood*, 194 Fed. 669, 114 C. C. A. 416; *Wood v. Spring Garden Ins. Co.*, 215 Fed. 355, 131 C. C. A. 497.

So it has been held that an insurance agent cannot bind the company by issuing a policy to a corporation of which he is an officer or stockholder.

Reference may be made to *Arispe Mercantile Co. v. Capital Ins. Co.*, 133 Iowa, 272, 110 N. W. 593, 9 L. R. A. (N. S.) 1084, 12 Ann. Cas. 93; *Arispe Mercantile Co. v. Queen Ins. Co.*, 141 Iowa, 607, 120 N. W. 122, 133 Am. St. Rep. 180; *Shamokin Mfg. Co. v. Ohio German Fire Ins. Co.*, 39 Pa. Super. Ct. 553; *Riverside Development Co. v. Hartford Fire Ins. Co.*, 105 Miss. 184, 62 South. 169, Ann. Cas. 1916D, 1274. But see *Milwaukee Mechanics' Ins.*

Co. v. Fuquay, 120 Ark. 330, 179 S. W. 497, holding that a fire policy, payable to mortgagee as interest might appear, is not void merely because, unknown to insurer, its agent was president of the mortgagee.

Similarly the agent of a life insurance company is to be regarded, in issuing a policy to himself, as acting for himself and not for the company (**Cauthen v. Hartford Life Ins. Co.**, 80 S. C. 264, 61 S. E. 428). His position in such a transaction requires that he should act in good faith in the observance of the company's rules and regulations relating to the delivery of policies (**Powell v. North State Mut. Life Ins. Co.**, 69 S. E. 12, 153 N. C. 124).

354-356. (h) Limitations on powers of agents—Limitations as to character of risk

355 (h). Instructions from an insurance company to its agent, not to write policies on property of insolvent or financially crippled debtors, do not avoid a policy written on such a risk, unless it appear that insured had knowledge of such inhibition (**German Ins. Co. v. Gibbs, Wilson & Co.**, 92 S. W. 1068, 42 Tex. Civ. App. 407, rehearing denied 96 S. W. 760, 42 Tex. Civ. App. 407). Where an agent was forbidden to insure "unoccupied buildings," such prohibition did not apply to new buildings in course of construction (**Harris v. North American Ins. Co.**, 190 Mass. 361, 77 N. E. 493, 4 L. R. A. [N. S.] 1137). So, too, authority to issue a policy on all the cotton in a building carries with it authority to issue a policy on only part of it (**Phoenix Ins. Co. v. Boyette**, 77 Ark. 41, 90 S. W. 284).

356 (h). A limitation on the power of an agent of an accident insurance company, by virtue of which he was forbidden to insure persons over 65 years of age, is not binding on an insured, unless he had notice thereof (**Crawford's Adm'r v. Travelers' Ins. Co.**, 124 Ky. 733, 99 S. W. 963, 124 Am. St. Rep. 425). So, too, instructions to agents and solicitors of an accident insurance company rendering the operation of a circular saw a prohibited risk are not admissible to modify an accident policy held by one to whom notice of the prohibition was never given in any way (**Denoyer v. First Nat. Accident Co.**, 130 N. W. 475, 145 Wis. 450).

356-358. (i) Same—Territorial limitations

356 (i). Where it was stipulated that an insurance agent's authority was limited to one county, and on a trip into another

county he solicited insurance generally, the company was not liable for the agent's retention of premium paid for policy applied for in the second county (*Springfield Fire & Marine Ins. Co. v. Ferrell*, 14 Ala. App. 527, 71 South. 615).

358-360. (j) Liabilities of agents

359 (j). An agent who has negligently failed to reduce the insurance on a certain risk in accordance with instructions received from the company is liable to the company for such failure; a loss having occurred before the reduction was effected.

Reference may be made to *British Am. Ins. Co. v. Wilson*, 77 Conn. 559, 60 Atl. 293; *Queen City Fire Ins. Co. v. First Nat. Bank*, 18 N. D. 603, 120 N. W. 545, 22 L. R. A. (N. S.) 509. As to sufficiency of the evidence in such cases, see *Shawnee Fire Ins. Co. v. Chapman*, 63 Tex. Civ. App. 61, 132 S. W. 854.

The measure of damages for the failure of the agent to comply with the instructions of the company in such cases is the amount, with interest, which the company is obliged to pay the insured under the policy over what it would have been obliged to pay, had the agent complied with the instructions (*Queen City Fire Ins. Co. v. First Nat. Bank*, 18 N. D. 603, 120 N. W. 545, 22 L. R. A. [N. S.] 509).

360-362. (k) Same—Writing insurance in unauthorized or insolvent company

360 (k). It seems to be well settled that one who undertakes in violation of a statute to act as agent for an insurance company not authorized to do business in the state personally guarantees the solvency of the company, and is personally liable to the insured for any loss sustained by him because of the insolvency of the company or its failure to perform its agreements, provided, of course, that the insured was without knowledge of the facts.

This rule seems to be supported by *Latham Mercantile & Commercial Co. v. Harrod*, 71 Kan. 565, 81 Pac. 214; *Vertrees v. Head & Matthews*, 138 Ky. 83, 127 S. W. 523; *Hartman & Daniels v. Hollowill*, 126 Iowa, 643, 102 N. W. 524; *Beckman v. Edwards*, 59 Wash. 411, 110 Pac. 6, Ann. Cas. 1912B, 40; *Bartlett v. Rothschild*, 214 Pa. 421, 63 Atl. 1030. And see *Drummond v. White-Swearingen Realty Co.* (Tex. Civ. App.) 165 S. W. 20; *Simons v. Vaughn & Blackwell*, 165 Ky. 167, 176 S. W. 995.

In an action against insurance agents to recover damages caused by fraudulent representations as to the solvency of the company,

by which the policy was issued, defendants, not having pleaded that plaintiff purposely burned his property as a defense to the action, could not give evidence thereof. *Vertrees v. Head & Matthews*, 138 Ky. 83, 127 S. W. 523.

It has also been held that it is not essential that the person sought to be held liable as agent should have been appointed to represent such unauthorized company, but it is sufficient if he has assumed to act for such company.

Such is the rule laid down in *Webster v. Ferguson*, 94 Minn. 86, 102 N. W. 213, and *Vertrees v. Head & Matthews*, 138 Ky. 83, 127 S. W. 523.

The liability of the agent exists, though the contract was not made in the state (*Bartlett v. Rothschild*, 214 Pa. 421, 63 Atl. 1030).

3. EXECUTORY AGREEMENTS TO INSURE

363-364. (a) Validity of agreement

363 (a). An executory agreement to insure is valid and binding on the parties.

State Mut. Fire Ins. Co. v. Taylor (Tex. Civ. App.) 157 S. W. 950; *Westchester Fire Ins. Co. v. Robinson* (Tex. Civ. App.) 192 S. W. 793; *Interstate Fire Ins. Co. v. McFall*, 114 Va. 207, 76 S. E. 293.

As a necessary corollary to the foregoing principle, it must follow that agreements to renew a policy are also valid (*Orient Ins. Co. v. Wingfield*, 49 Tex. Civ. App. 202, 108 S. W. 788).

364-368. (b) Contract may be oral

365 (b). As oral executory contracts to insure are valid (*National Live Stock Ins. Co. v. Cramer* [Ind. App.] 114 N. E. 427), it follows that an oral contract to renew existing insurance is also valid.

German Ins. Co. v. Goodfriend (Ky.) 97 S. W. 1098; *Brown v. Home Ins. Co.*, 82 Kan. 442, 108 Pac. 824.

367 (b). While the general rule, as indicated in the original text, seems to be that requirements in the statute or charter, to the effect that contracts of insurance must be in writing, do not preclude the making of valid oral executory contracts, it has been held

in Pennsylvania (*Benner v. Fire Association of Philadelphia*, 229 Pa. 75, 78 Atl. 44, 140 Am. St. Rep. 706) that an insurance company organized under a statute providing that the president and directors of the company shall have power to make insurance, and that every such contract and policy made by the company shall be in writing or in print, cannot make a binding parol contract to renew an insurance in the future, where no elements of estoppel are present.

368-374. (c) Nature and requisites of an executory contract

368 (c). An executory contract to insure is not enforceable, unless all the elements essential to a contract of insurance, viz. the subject-matter, parties, rate of premium, amount, and duration of risk have been agreed upon.

Benner v. Fire Ass'n of Philadelphia, 229 Pa. 75, 78 Atl. 44, 140 Am. St. Rep. 706; *Etter v. St. Paul Fire & Marine Ins. Co.*, 54 Pa. Super. Ct. 187.

Where it appeared that the minds of the parties to a fire insurance policy never met, no contract between them was ever entered into. *Johnson v. Mennonite Mut. Fire Ins. Co.*, 100 Kan. 53, 163 Pac. 1074.

Where a person takes out a policy of fire insurance and asks the agent to renew the policy when it falls due, and the agent promised to do so, but fails to perform his promise, and nothing is said at the time as to the term of the new insurance, or the rate or amount to be paid, or the property covered, the insurance company cannot be held as on a binding contract (*Etter v. St. Paul Fire & Marine Ins. Co.*, 54 Pa. Super. Ct. 187). It is, however, no objection to the contract that the risk has not been apportioned (*Interstate Fire Ins. Co. v. McFall*, 114 Va. 207, 76 S. E. 293).

374-375. (d) Presumption as to usual conditions of policy

374 (d). When nothing has been said in forming the executory contract as to the conditions of the contract, the parties will be presumed to intend that the contract shall contain the conditions usually inserted in policies of like kind.

House v. Security Fire Ins. Co., 145 Iowa, 462, 121 N. W. 509; *Clark v. Bankers' Accident Ins. Co.*, 96 Neb. 381, 147 N. W. 1118.

Where policy issued pursuant to oral agreement did not follow agreement, and policy which should have been issued would have been subject to Laws Or. 1911, p. 279, insured cannot recover on

oral agreement independent of policy, where suit was not brought within time limited by such law (*Greenberg v. German American Ins. Co.*, 83 Or. 662, 163 Pac. 820).

375-376. (e) Payment of premium

375 (e). The prepayment of the premium is not an essential condition of an executory agreement to insure, or of a parol agreement to renew, an existing insurance at its expiration.

Brown v. Home Ins. Co., 82 Kan. 442, 108 Pac. 824; *German Ins. Co. v. Goodfriend* (Ky.) 97 S. W. 1098; *Interstate Fire Ins. Co. v. McFall*, 114 Va. 207, 76 S. E. 293. But see *California Ins. Co. v. Settle*, 162 Ky. 82, 172 S. W. 119.

377-378. (g) Merger of executory agreement in policy

378 (g). An oral contract to insure an automobile expired where the insurance company issued a policy purporting to agree with the verbal understanding and insured retained it over five weeks (*Mowles v. Boston Ins. Co.*, 226 Mass. 426, 115 N. E. 666). And where insured accepted a policy which did not follow his oral agreement, he was thereby precluded from subsequently asserting that contract was contained in agreement; it having been superseded by policy (*Greenberg v. German American Ins. Co.*, 83 Or. 662, 163 Pac. 820).

378-381. (h) Powers of agents—In general

378 (h). An agent duly authorized to bind his company by contracts for insurance may make valid contract by parol, or by a binding slip or memorandum; and a general authority to solicit insurance, receive premiums, and deliver policies is sufficient to cover an executory contract to insure (*Sun Ins. Office of London v. Mitchell*, 186 Ala. 420, 65 South. 143). While an oral agreement to renew insurance may be valid, though made by an agent, the circumstances must be such as to indicate apparent authority in him (*Underwood v. Pennsylvania Fire Ins. Co.* (Sup.) 134 N. Y. Supp. 105). So an agent, with no authority to make an actual contract of insurance for the company, has no authority to bind the company by an executory agreement to renew (*Benner v. Fire Ass'n of Philadelphia*, 229 Pa. 75, 78 Atl. 44, 140 Am. St. Rep. 706). And where the only authority which an agent has under his commission is to issue, countersign, or renew printed policies, he has

no authority to make an oral executory contract to renew (*Caldwell v. Virginia Fire & Marine Ins. Co.*, 124 Tenn. 593, 139 S. W. 698). It has been held in *Underwood v. Pennsylvania Fire Ins. Co.* (Sup.) 134 N. Y. Supp. 105, that under a New York standard fire policy a local agent is not authorized to bind the insurer by promising to renew eight months before expiration of the policy.

384-386. (m) Action on agreement—Remedies—Jurisdiction

385 (m). Failure of the insured to make proof of loss or to sue within one year after the fire will not bar an action for damages for breach of the contract to issue a policy (*Chenier v. Insurance Co. of North America*, 72 Wash. 27, 129 Pac. 905, 48 L. R. A. [N. S.] 319, Ann. Cas. 1914D, 649).

386-387. (n) Same—Pleading

386 (n). In an action to recover life insurance, the complaint was sufficient to sustain a judgment for plaintiff where its allegations showed her husband had been entitled to a certificate of insurance in her favor (*Knights of Maccabees of the World v. Gordon*, 83 Ark. 17, 102 S. W. 711). Where a bill in equity to recover the proceeds of a mutual benefit certificate, which was in the possession of the insurer, was accompanied by no affidavit stating that the certificate was retained by the defendant, a demurrer to the bill would have been sustained, if interposed, and even without a demurrer the suit might have been dismissed on motion, because of the existence of an adequate remedy at law (*Hoagland v. Supreme Council, Royal Arcanum*, 61 Atl. 982, 70 N. J. Eq. 607).

388-390. (o) Same—Evidence

389 (o). In *Benner v. Fire Ass'n of Philadelphia*, 229 Pa. 75, 78 Atl. 44, 140 Am. St. Rep. 706, it was held that evidence merely of a conversation on the street between plaintiff and the agent of an insurance company as to renewing insurance, with no money passing, no memorandum being made and no definite promise on either side, is insufficient to show a parol contract of the insurance company to insure in the future.

The sufficiency of the evidence to establish an executory contract to insure was considered in *Rounsville v. North Carolina Home Fire Ins. Co.*, 138 N. C. 191, 50 S. E. 619, and in *Orient Ins. Co. v. Wingfield*, 49 Tex. Civ. App. 202, 108 S. W. 788.

390. (p) Same—Damages—Trial—Appeal

390 (p). In an action on a contract to renew a fire policy, where no renewal policy is issued, and there was a total loss, the measure of damages is the amount of the old policy, in the absence of evidence of change in the property insured, or its value (*Orient Ins. Co. v. Wingfield*, 49 Tex. Civ. App. 202, 108 S. W. 788).

In an action against a guaranty company for breach of a contract to furnish bonds for plaintiff at "a premium charge at the rate of 15 cents per \$100 for each bond," whether the rate was 15 cents per annum, or for the whole term, and whether the words "per annum" were omitted from the contract by mistake, are at most questions of fact (*Mosier v. United States Fidelity & Guaranty Co.*, 119 N. Y. Supp. 157, 134 App. Div. 849, affirmed 202 N. Y. 521, 95 N. E. 1134).

VALIDITY OF ORAL CONTRACTS OF INSURANCE

391-394. (b) Nature and requisites of the oral contract

391 (b). A parol contract of insurance, as distinguished from a parol agreement to issue a policy, must not be executory, but must take effect in præsenti (*Hartford Fire Ins. Co. v. Whitman*, 79 N. E. 459, 75 Ohio St. 312, 9 Ann. Cas. 218). And an alleged oral contract of insurance is not enforceable, where the parties only contemplate the existence of a contract on a delivery of the policies and payment of the premiums (*Cunningham v. Connecticut Fire Ins. Co.*, 200 Mass. 333, 86 N. E. 787).

392 (b). In order that there shall be a valid oral contract of insurance, there must be a meeting of minds as to the essential elements of the insurance contract, namely, the subject-matter, the risk insured against, the amount, the duration of the risk, and the rate of premium.

This elementary principle is supported by *Barlow v. Farmers' Mut. Fire Ins. Co.*, 128 Ill. App. 580; *Posey County Fire Ass'n v. Hogan*, 37 Ind. App. 573, 77 N. E. 670; *Ohio Farmers' Ins. Co. v. Bell*, 51 Ind. App. 377, 99 N. E. 812; *Shawnee Fire Ins. Co. v. Roll*, 145 Ky. 113, 140 S. W. 49; *Thompson v. Germania Fire Ins. Co.*, 45 Wash. 482, 88 Pac. 941; *Ogle Lake Shingle Co. v. National Lumber Ins. Co.*, 68 Wash. 185, 122 Pac. 990.

Where the premiums for a fire policy had not been agreed on by the parties, there was no valid insurance. *Roberta Mfg. Co. v. Royal Exchange Assur. Co.* (N. C.) 76 S. E. 865.

395-397. (d) Validity of oral contract—Present doctrine

397 (d). The doctrine is well settled that, in the absence of a prohibitory statute or other positive regulation, a contract of insurance can be made by parol.

The validity of the oral contract is upheld by the following cases:

Ætna Ins. Co. v. Short, 124 Ark. 505, 187 S. W. 657; *American Can Co. v. Agricultural Ins. Co. of Watertown, N. Y.*, 106 Pac. 720, 12 Cal. App. 133; *Hawthorne v. German Alliance Ins. Co.*, 181 Ill. App. 88; *Bracken County Ins. Co. v. Murray*, 179 S. W. 842, 166 Ky. 821; *Cunningham v. Connecticut Fire Ins. Co.*, 200 Mass. 333, 86 N. E. 787; *McQuaid v. Ætna Ins. Co.*, 226 Mass. 281, 115 N. E. 428; *King v. Phoenix Ins. Co.*, 92 S. W. 892, 195 Mo. 290, 113 Am. St. Rep. 678, 6 Ann. Cas. 618; *Shepard v. Boone County Home Mut. Fire Ins. Co.*, 138 Mo. App. 20, 119 S. W. 984; *McIntyre v. Federal Life Ins. Co.*, 126 S. W. 227, 142 Mo. App. 256; *Rankin v. Northern Assur. Co. of Michigan*, 98 Neb. 172, 152 N. W. 324; *International Ferry Co. v. American Fidelity Co.*, 101 N. E. 160, 207 N. Y. 350, reversing judgment 129 N. Y. S. 1129, 145 App. Div. 906; *Lea v. Atlantic Fire Ins. Co.*, 168 N. C. 478, 84 S. E. 813; *Boos v. Ætna Ins. Co.*, 22 N. D. 11, 132 N. W. 222; *Ripka v. Mutual Fire Ins. Co.*, 36 Pa. Super. Ct. 517; *Austin Fire Ins. Co. v. Brown* (Tex. Civ. App.) 160 S. W. 973; *Ogle Lake Shingle Co. v. National Lumber Ins. Co.*, 68 Wash. 185, 122 Pac. 990; *Whitman v. Milwaukee Fire Ins. Co.*, 107 N. W. 291, 128 Wis. 124, 5 L. R. A. (N. S.) 407, 116 Am. St. Rep. 25; *Royal Ins. Co. v. O. L. Walker Lumber Co.*, 24 Wyo. 59, 155 Pac. 1101, Ann. Cas. 1917E, 1174, affirming judgment on rehearing, 23 Wyo. 264, 148 Pac. 340.

397-398. (e) Same—Life and accident insurance

398 (e). Though such contracts are unusual, oral contracts of life insurance are valid, and if such a contract is made, and the premium paid, and the insurer refuses to issue a policy as required by the contract, an action for damages for such breach may be maintained by the party in whose favor the insurance was effected (*Carter v. Bankers' Life Ins. Co.*, 120 N. W. 455, 83 Neb. 810).

The doctrine that life insurance contracts may rest in parol is also asserted in *McIntyre v. Federal Life Ins. Co.*, 142 Mo. App. 256, 126 S. W. 227; *Hollin v. Essex Mut. Ben. Ass'n*, 88 N. J. Law, 204, 96 Atl. 71; *Brotherhood of Locomotive Firemen & Enginemen v. Corder*, 52 Ind. App. 214, 97 N. E. 125; *Knights of Maccabees of the World v. Gordon*, 83 Ark. 17, 102 S. W. 711; *McCracken v. Travelers' Ins. Co. of Hartford, Conn.* (Okl.) 156 Pac. 640.

398. (f) Same—Renewal

398 (f). An insurance company, through its authorized agent, may contract by parol to renew a policy.

National Live Stock Ins. Co. v. Cramer (Ind. App.) 114 N. E. 427; *Struzewski v. Farmers' Fire Ins. Co.*, 179 App. Div. 318, 166 N. Y. Supp. 362; *Westchester Fire Ins. Co. v. Robinson* (Tex. Civ. App.) 192 S. W. 793.

A parol agreement by agent of an insurer with insured that the agent would keep insurance in force by renewing policy, insured to pay premium for renewal, is an executory contract to contract in future to renew policy which would require interposition of equity to enforce. *Westchester Fire Ins. Co. v. Robinson* (Tex. Civ. App.) 192 S. W. 793.

Though renewal contracts may be made by parol, the custom of agents in a certain locality to renew policies without notice or request does not constitute a parol contract sufficient to support a cause of action for the recovery for a loss (*American Cent. Ins. Co. v. Hardin*, 146 S. W. 418, 148 Ky. 246). In *Shepard v. Boone County Home Mut. Fire Ins. Co.*, 138 Mo. App. 20, 119 S. W. 984, the facts were that the agent visited plaintiff while he was ill to renew some policies, when plaintiff stated that he wanted to renew a policy on his barn. The agent wrote the word "renew" or "renewed" in a memorandum, and plaintiff said he would shortly call at the office and receive a policy, but forgot to do so until the barn was burned. It was the custom of policy holders to order renewals and shortly after sign an application and take out the policy as of the date of the expired policy. It was held that no contract of insurance was made, so that plaintiff could not recover for the loss.

Where the agent of a fire insurance company, authorized to issue policies and to make renewals, was not required to receive premium in advance as condition precedent to making parol contracts to renew policy, he was authorized to make a preliminary contract binding upon the company to be consummated by filling out and delivering policy pursuant thereto (*Ætna Ins. Co. v. Short*, 124 Ark. 505, 187 S. W. 657).

In *Caldwell v. Virginia Fire & Marine Ins. Co.*, 124 Tenn. 593, 139 S. W. 698, it appeared that at the time when a purported oral contract of fire insurance was made by the agent, insured had an outstanding policy which provided that no privilege or permission affecting the insurance should be claimed by insured unless writ-

ten upon or attached to the policy. It was held that insured was estopped from setting up an oral contract of insurance, made without authority, while the written policy existed, and identical with it as to parties, amount of indemnity, and subject-matter, such a contract being in fraud of the company's rights under the policy.

398-401. (g) Statutory and charter provisions

398 (g). Where there are direct statutory provisions requiring all contracts of insurance to be in writing, as in Georgia (Code 1895, §§ 2022, 2089), it necessarily follows that a contract of insurance cannot rest in parol.

Delaware Ins. Co. v. Pennsylvania Fire Ins. Co., 126 Ga. 380, 55 S. E. 330, 7 Ann. Cas. 1134; Todd v. German-American Ins. Co., 2 Ga. App. 789, 59 S. E. 94. Nor can the contract be partly in writing and partly in parol. Athens Mut. Ins. Co. v. Evans, 132 Ga. 703, 64 S. E. 993.

But a provision in the charter or by-laws of an insurance company merely requiring the signature of the president to all policies of insurance does not prevent its making an oral contract of insurance (King v. Phoenix Ins. Co., 92 S. W. 892, 195 Mo. 290, 113 Am. St. Rep. 678, 6 Ann. Cas. 618).

402-403. (f) Statute of frauds

403 (f). Though it has been held in Louisiana, as indicated in the original text, that a contract of reinsurance is within the statute of frauds as a promise to pay the debt of another, this doctrine is denied in Missouri (McIntyre v. Federal Life Ins. Co., 142 Mo. App. 256, 126 S. W. 227). The court takes the position that the contract is one of insurance purely, and not an agreement to answer for the debt of another, as that phrase is used in the statute of frauds.

403-404. (j) Powers of agents

403 (j). An agent duly authorized to bind the company by contracts of insurance may, in the absence of restrictions on his powers, bind the company by an oral contract.

Reference may be made to King v. Phoenix Ins. Co., 92 S. W. 892, 195 Mo. 290, 113 Am. St. Rep. 678, 6 Ann. Cas. 618; Boos v. Aetna Ins. Co., 22 N. D. 11, 132 N. W. 222; Ripka v. Mutual Fire Ins. Co. of Annville, 36 Pa. Super. Ct. 517; McQuaid v. Aetna Ins.

Co., 226 Mass. 281, 115 N. E. 428; *Hertz v. Security Mut. Ins. Co.*, 154 N. W. 745, 131 Minn. 147; *Gresham v. Norwich Union Fire Ins. Society*, 163 S. W. 214, 157 Ky. 402.

The agent may, however, be authorized to make contracts only in writing, in which case he cannot, of course, bind the company by an oral contract of insurance (*Mulrooney v. Royal Ins. Co.* [C. C.] 157 Fed. 598). And, of course, a mere solicitor for insurance may not, without authority, bind insurer by a parol contract for insurance of which insurer has no knowledge (*Francis v. Mutual Life Ins. Co.*, 55 Or. 280, 106 Pac. 323).

An agent of an insurance company, with full power to renew policies, has power to bind the principal by a parol agreement to renew a policy.

Hawthorne v. German Alliance Ins. Co., 181 Ill. App. 88; *National Live Stock Ins. Co. v. Cramer* (Ind. App.) 114 N. E. 427; *Gresham v. Norwich Union Fire Ins. Society*, 163 S. W. 214, 157 Ky. 402; *Fireman's Fund Ins. Co. of San Francisco, Cal., v. Searcy*, 163 S. W. 1103, 157 Ky. 749; *Willson v. German American Ins. Co.*, 95 Neb. 774, 146 N. W. 945.

405-406. (1) Pleading and practice

405 (1). An insured is not entitled to any legal relief where he alleged in his bill the existence of an oral executed contract of fire insurance while the proof only showed an executory contract to renew a policy, the variance being fatal to any legal relief (*Caldwell v. Virginia Fire & Marine Ins. Co.*, 124 Tenn. 593, 139 S. W. 698). Though the Georgia statute requires a contract of insurance to be in writing, it is not necessary to allege, in a suit on an insurance contract, that it is in writing, but in such a case, as against a demurrer, the presumption is that the contract is in writing, as the law requires it to be (*Social Benev. Soc. No. 1 v. Holmes*, 56 S. E. 775, 127 Ga. 586).

The proof of an oral contract of insurance must clearly show that the contract was actually entered into, that the parties understood it in the same light, and that both understood it as referring to the same subject-matter (*American Can Co. v. Agricultural Ins. Co.*, 12 Cal. App. 133, 106 Pac. 720).

The sufficiency of the evidence to establish an oral contract of insurance is considered in *American Can Co. v. Agricultural Ins. Co.*, 12 Cal. App. 133, 106 Pac. 720; *Pelican Assur. Co. v. Schild-*

knecht, 108 S. W. 312, 128 Ky. 351, 32 Ky. Law Rep. 1257; Shawnee Fire Ins. Co. v. Roll, 140 S. W. 49, 145 Ky. 113.

406 (1). Whether a binding oral contract of insurance has been entered into, is a question for the jury.

American Cent. Ins. Co. v. Hardin, 146 S. W. 418, 148 Ky. 246; McIntyre v. Federal Life Ins. Co., 126 S. W. 227, 142 Mo. App. 256; Grossbaum Ceramic Art Syndicate v. German Ins. Co., 62 Atl. 1107, 213 Pa. 506.

In an action upon a parol contract of insurance alleged to have been made by the agent, an instruction that if it was the custom of the agents to renew policies without request from the policy holder, and that, if the agent did renew plaintiff's policy, the company was liable, was not misleading because of the reference to the custom (American Cent. Ins. Co. v. Hardin, 146 S. W. 418, 148 Ky. 246).

5. COMPLETION OF CONTRACT—APPLICATION OR OFFER AND ACCEPTANCE

407-410. (a) Application and necessity therefor in general

407 (a). An insurer has the right to provide a form of application for its business, and to require that it be used by agents and those desiring insurance, and that a separate application be made for each policy, especially in view of Ky. St. 1903, § 679, providing that no application shall be treated as part of the contract unless attached to the policy (Provident Sav. Life Assur. Soc. v. Elliott's Ex'r, 93 S. W. 659, 29 Ky. Law Rep. 552).

408 (a). While it is true that an agent cannot as against the insurer effect a contract of insurance in favor of one who has not applied therefor, yet if a policy is issued and delivered to the insured, who accepts the same and pays the premium thereon, the fact that the policy was issued without prior application by the insured will not prevent its going into effect as against the company (Frankfort Marine Accident & Plate Glass Ins. Co. v. Lynch, 156 Ill. App. 485). The rule that there must be an application as exemplified in Stebbins v. Lancashire Ins. Co., 60 N. H. 65, referred to in the original text is also supported by Berman v. North British & Mercantile Ins. Co., 74 Misc. Rep. 431, 132 N. Y. Supp. 392. In that case the original policy had been obtained through a broker. Though

no request was made to the broker to procure a renewal at the expiration of the original the insurer issued a new policy and delivered it to the broker, who retained it. It was held, nevertheless, that there was no contract of insurance. It has, however, been held in Texas (*Hanover Fire Ins. Co. v. Turner* [Tex. Civ. App.] 147 S. W. 625) that, where an insurance broker agreed with the owner to keep the property insured for a certain time, the broker's act in securing a policy to replace a worthless one insured to the owner, though he did not know of the act. So, too, in *Todd v. German American Ins. Co.*, 2 Ga. App. 789, 59 S. E. 94, it was held that where plaintiff directed an insurance agency, in which defendant company as well as other insurers was represented, to carry for him on the property subsequently burned a certain amount of insurance, and policies to the amount specified were written in different companies chosen by the agency, and on one of these companies becoming bankrupt the agency replaced the portion of insurance carried by it by writing a policy of similar amount in defendant company, there was a completed contract of insurance, notwithstanding plaintiff did not know of the substitution of the policies until after the fire occurred, and the policy was never delivered to him.

The rule that there must be an application has also been supported in cases where another phase of the question has arisen. Thus in *Provident Sav. Life Assur. Soc. v. Elliott's Ex'r*, 93 S. W. 659, 29 Ky. Law Rep. 552, it was held that where an application for life insurance was rejected because the applicant asked the right to change the beneficiary, but a policy was made out and sent to be delivered on signature of an application correct in this respect, but the applicant died before it reached him, the contract was never completed.

Reference may also be made to *Dickey v. Continental Casualty Co.*, 40 Tex. Civ. App. 199, 89 S. W. 436, where applicant had authorized the agent to sign the application for him, and it did not appear whether the application was actually completed before the applicant died or not.

Though an application may be made by a duly authorized agent of the insured, a contract for insurance made by an unauthorized agent on behalf of his principal on which the premium has not been paid is not binding on the insurer before the principal has ratified, nor can it be bound by a ratification or a tender of the premium by

the agent after the occurrence of a fire which has destroyed the subject of insurance, and which fact is known to both parties (*Kline Bros. & Co. v. Royal Ins. Co.* [C. C.] 192 Fed. 378).

409 (a). An application for insurance need not be in writing (*Empire Mut. Annuity & Life Ins. Co. v. Avery*, 3 Ga. App. 97, 59 S. E. 324). Moreover, it is not necessary that the application be signed by the insurer, though it recites that it is signed by the insured "in consideration of the mutual covenants" of the insurer (*Ætna Indemnity Co. v. Ryan*, 53 Misc. Rep. 614, 103 N. Y. Supp. 756). If the application is in writing, the report of insurer's medical examiner is an essential part thereof and the application is not complete until signed by the applicant after the medical examiner's report was written therein and delivered to the insurer's agent for transmission (*Mutual Life Ins. Co. of New York v. Hilton-Green*, 202 Fed. 113, 120 C. C. A. 267).

One does not become member of co-operative insurance company merely by signing application, notwithstanding Ky. St. § 702, and hence agreement that insurance should be in force from the date of the application was invalid. *Bracken County Ins. Co. v. Murray*, 179 S. W. 842, 166 Ky. 821.

410 (a). Whether the application was made by the insured or one duly authorized to act for him is for the jury.

Reference may be made to *Walsh v. Metropolitan Life Ins. Co.*, 93 N. Y. Supp. 445, 105 App. Div. 186; *Robinson v. Union Central Life Ins. Co.* (C. C.) 144 Fed. 1005.

410-413. (b) Necessity of mutuality

411 (b). In accordance with the fundamental principle of mutuality, it is necessary, in order that there may be a valid contract of insurance, that the parties to the contract should mutually agree on or assent to the terms of the contract.

This principle is supported by and illustrated in the following cases: *Todd v. German-American Ins. Co. of New York*, 59 S. E. 94, 2 Ga. App. 789; *New York Life Ins. Co. v. McIntosh*, 86 Miss. 236, 38 South. 775; *Bradley v. Standard Life & Accident Ins. Co.*, 112 App. Div. 536, 98 N. Y. Supp. 797, reversing 46 Misc. Rep. 41, 93 N. Y. Supp. 245; *Nordness v. Mutual Cash Guaranty Fire Ins. Co.*, 22 S. D. 1, 114 N. W. 1092; *Costello v. Grant County Mut. Fire & Lightning Ins. Co.*, 133 Wis. 361, 113 N. W. 639.

A fire policy issued by an insurance agent without the knowledge and consent of insurer or insured is not valid. *Roberta Mfg. Co. v. Royal Exchange Assur. Co.*, 161 N. C. 88, 76 S. E. 865.

412 (b). As to the elements regarded as essential to a complete contract of insurance, namely, the subject-matter, the risk, the duration of the risk, the rate of premium, and the amount of indemnity, there must be a meeting of minds, an agreement between the proposer and the insurer, in order to create a contract of insurance.

This principle is supported by *Barlow v. Farmers' Mut. Fire Ins. Co.*, 128 Ill. App. 580; *Posey County Fire Ass'n v. Hogan*, 77 N. E. 670, 37 Ind. App. 573; *Ohio Farmers' Ins. Co. v. Bell*, 51 Ind. App. 377, 99 N. E. 812; *Shawnee Fire Ins. Co. v. Roll*, 140 S. W. 49, 145 Ky. 113; *Thompson v. Germania Fire Ins. Co.*, 45 Wash. 482, 88 Pac. 941; *Ogle Lake Shingle Co. v. National Lumber Ins. Co.*, 68 Wash. 185, 122 Pac. 990.

Where the minds of an owner and of an insurance agent never met as to the identity of the house to be insured, the agreement which was an essential element of the contract was wanting, so that there was no contract or liability (*Dixie Fire Ins. Co. v. Wallace*, 156 S. W. 140, 153 Ky. 677, Ann. Cas. 1915C, 409). But, though there should be a meeting of minds in making an insurance contract, an express agreement upon all details is not necessary, and an acceptance by company of an application for a policy and an unconditional deposit in post office of such policy, properly addressed is sufficient (*Hartwig v. Aetna Life Ins. Co. of Hartford, Conn.*, 158 N. W. 280, 164 Wis. 20).

413-415. (c) Necessity of acceptance or approval

413 (c). Until it is accepted or approved by some one having authority to accept the terms proposed, the application is not a contract of insurance but merely a proposal.

This elementary principle is supported by the following cases: *Live Stock Ins. Ass'n of Huntington, Wabash and Whitley Counties v. Stickler* (Ind. App.) 115 N. E. 691; *Supreme Lodge, K. P., v. Graham*, 49 Ind. App. 535, 97 N. E. 806; *Torpey v. National Life Ins. Co. (Ky.)* 92 S. W. 962; *Claypool v. Continental Casualty Co.*, 129 Ky. 682, 112 S. W. 835; *Northwestern Mut. Life Ins. Co. v. Neafus*, 145 Ky. 563, 140 S. W. 1026, 36 L. R. A. (N. S.) 1211; *Carleton v. Patrons' Androscoggin Mut. Fire Ins. Co.*, 100 Me. 79, 82 Atl. 649, 39 L. R. A. (N. S.) 951; *Rhodus v. Kansas City Life Ins. Co.*, 156 Mo. App. 281, 137 S. W. 907; *Lowe v. St. Paul Fire & Marine Ins. Co.*, 80 Neb. 499, 114 N. W. 586; *Ripka v. Mutual Fire Ins. Co. of Annville*, 36 Pa. Super. Ct. 517;

Wacker v. Globe Fire Ins. Co., of Huron, S. D. (N. D.) 163 N. W. 263; Dorman v. Connecticut Fire Ins. Co., 41 Okl. 509, 139 Pac. 262, 51 L. R. A. (N. S.) 873; McCracken v. Travelers' Ins. Co., Conn. (Okl.) 156 Pac. 640.

Where an application for fire insurance provided that no liability should attach until the application was actually approved by the home office, there can be no recovery where the jury found that the application had not been approved. Merchants' & Bankers' Fire Underwriters v. Parker (Tex. Civ. App.) 190 S. W. 525.

Where an applicant's medical certificate was never approved by the Grand Lodge, the constitution and by-laws of which made such approval a prerequisite of membership, no contract arose between that body and the applicant, notwithstanding his initiation by a subordinate lodge which accepted and retained dues from him for three months (Gutkowsky v. Grand Lodge, Progressive Order of the West, 194 Ill. App. 452). So where a loss occurred before the application was received by the company, or approved by one having authority to accept, no liability was incurred by the insurer.

Reference may be made to Claypool v. Continental Casualty Co., 129 Ky. 682, 112 S. W. 835; Carleton v. Patrons' Androscoggin Mut. Fire Ins. Co., 109 Me. 79, 82 Atl. 649, 39 L. R. A. (N. S.) 951; Lowe v. St. Paul Fire & Marine Ins. Co., 80 Neb. 490, 114 N. W. 586; Ripka v. Mutual Fire Ins. Co. of Annville, 36 Pa. Super. Ct. 517.

Where an agent having limited authority to receive applications and forward them for acceptance or rejection gave an applicant a receipt, providing that the application and premium should be returned if the policy were not issued, and two days thereafter, while the company was investigating the risk, the property burned, whereupon the application was rejected and return of premium tendered, there was no contract of insurance (Shawnee Mut. Fire Ins. Co. v. McClure, 39 Okl. 535, 135 Pac. 1150, 49 L. R. A. [N. S.] 1054).

415 (c). An application for insurance is a proposition to the insurance company which must be accepted as made, if at all (*Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co.*, 154 F. 545, 83 C. C. A. 431). Consequently, if the insurer replies to the application by proposing different terms, no contract exists until the counter proposition has been accepted by the applicant (*McNicol v. New York Life Ins. Co.*, 149 Fed. 141, 79 C. C. A. 11).

416-417. (d) Withdrawal of application

416 (d). As the application is merely a proposal for a contract, the applicant may withdraw it at any time before acceptance (*Hubbard v. State Life Ins. Co.*, 129 Iowa, 13, 105 N. W. 332). Consequently a note given for the first premium on an insurance policy is not collectible where the applicant canceled his application before acceptance by the insurer (*Wheelock v. Clark*, 21 Wyo. 300, 131 Pac. 35, Ann. Cas. 1916A, 956). A stipulation in an application that applicant would accept the policy if issued is only an agreement not to withdraw the offer before the policy was delivered, and by a refusal to accept the policy when tendered, the applicant withdraws his offer and is not liable on his premium note (*Citizens' Nat. Life Ins. Co. v. Murphy*, 156 S. W. 1069, 154 Ky. 88). So, too, an agent may withdraw the application under some circumstances. Thus, when the applicant died before the application had gone forward to the company, the agent learning of that fact was justified in withdrawing the application (*Torpey v. National Life Ins. Co.* [Ky.] 92 S. W. 982). So an insurer, on learning of a changed physical condition of the insured after his application and before the policy was delivered and effective, may cancel the application and refuse to contract (*Goldstein v. New York Life Ins. Co.*, 176 App. Div. 813, 162 N. Y. Supp. 1088).

417-421. (e) Power of agent to accept or approve application

419 (e). Agents soliciting life insurance and collecting the first premium thereon are not authorized to conclude contracts of insurance (*Rhodus v. Kansas City Life Ins. Co.*, 137 S. W. 907, 156 Mo. App. 281). It was also held in *Norman v. Order of United Commercial Travelers of America*, 163 Mo. App. 175, 145 S. W. 853, that a state secretary could not bind the order by an acceptance of the applicant as a member.

421 (e). Where plaintiff told a fire insurance agent that, if he could get insurance for him at a certain rate, he would take it, and the agent said he would try to get it at that rate, no contract of insurance was then made, and the agent did no more than undertake to secure for plaintiff insurance at the stipulated rate, and the fact that he afterward wrote a policy naming such rate is of no consequence in view of the understanding between them. As the agent had no power to issue a policy at the rate named there could be no completed contract (*Watrous v. Des Moines Ins. Co.*, 144 Iowa, 551, 123 N. W. 171).

421-423. (f) What constitutes acceptance or approval

421 (f). A binding acceptance of an application is, of course, indicated by mailing a letter, in due course, containing the insurer's unconditional acceptance of the application (*Waters v. Security Life & Annuity Co.*, 144 N. C. 663, 57 S. E. 437, 13 L. R. A. [N. S.] 805). So, too, an applicant receiving a letter from the agent advising him that the company has accepted his application is justified in assuming that a binding contract exists (*New York Life Ins. Co. v. McIntosh* [Miss.] 41 South. 381). But an acceptance need not be in writing (*Supreme Lodge, K. P., v. Graham*, 49 Ind. App. 535, 97 N. E. 806). It is not essential that there be a formal acceptance. Any appropriate act which unmistakably manifests the intention of the insurer to accept is sufficient. Thus the issuance and delivery of the policy is proof of approval (*Van Arsdale-Osborne Brokerage Co. v. Cooper*, 28 Okl. 598, 115 Pac. 779), and so, too, is the sending of the policy to the agent with directions to deliver.

Reference may be made to *Waters v. Security Life & Annuity Co.*, 144 N. C. 663, 57 S. E. 437, 13 L. R. A. (N. S.) 805; *Bowman v. Northern Acc. Co.*, 124 Mo. App. 477, 101 S. W. 691.

It is not, of course, every act that will show an acceptance. Thus it has been held in *Provident Sav. Life Assur. Soc. of New York v. Elliott's Ex'r* (Ky.) 93 S. W. 659, that the waiver by an insurer of a provision in an application for insurance that the insurer should incur no liability thereunder till it had been received, approved, and a policy issued and the premium paid, did not affect the right of the insurer to reject the application. In the same case it was also held that the approval of an application for insurance by the insurer's medical board does not constitute an acceptance; that board having no power to accept the application. If, however, it was the custom of a fraternal order that the medical examiner's acceptance was treated as an acceptance by insurer, such custom was binding (*Supreme Lodge, K. P., v. Graham* [Ind. App.] 114 N. E. 879). But an insurer cannot show that a certain person had not approved the policy, where the policy contained no clause or condition requiring such signature (*Peters & Roberts Furniture Co. v. Queen City Fire Ins. Co.*, 63 Or. 382, 126 Pac. 1005).

A life insurance company could not have complied with Rev. St. Mo. 1909, § 6975, forbidding issuance of policy until applicant has been

examined by physician duly licensed and appointed by company as its medical examiner, by employing an examiner in Missouri who had not been licensed to practice medicine therein pursuant to Rev. St. 1909, §§ 8311-8319. *Sturgeon v. Pioneer Life Ins. Co.* (Mo. App.) 186 S. W. 1192.

Though the insurer's receipt of premium does not necessarily indicate acceptance of the application (*Live Stock Ins. Ass'n of Huntington, Wabash and Whitley Counties v. Stickler* [Ind. App.] 115 N. E. 691), it may tend to show the fact (*Van Arsdale-Osborne Brokerage Co. v. Cooper*, 28 Okl. 598, 115 Pac. 779). So, too, it may be shown by the fact that a mutual company levied an assessment (*Stewart v. Glade Mill Mut. Fire Ins. Co.*, 41 Pa. Super. Ct. 472).

422 (f). Whatever be the mode of acceptance it must be definite and identical with the terms proposed.

This principle is supported by *Empire Mut. Annuity & Life Ins. Co. v. Avery*, 3 Ga. App. 97, 59 S. E. 324; *German American Ins. Co. v. Darrin*, 80 Kan. 578, 103 Pac. 87; *Kell v. New York Life Ins. Co.*, 20 Okl. 195, 94 Pac. 177.

Thus, where a person makes application for insurance for one year to an agent representing more than one company, and receives no policy, but his application is accepted for three years, without his knowledge until after the fire either of the longer term or of the company which had issued the insurance there is no contract between the parties (*Costello v. Grant County Mut. Fire & Lightning Ins. Co.*, 113 N. W. 639, 133 Wis. 361).

An affidavit of defense, explicitly denying that a policy had been issued or the application had been accepted, or that the insurer had ever so stated, was regarded as sufficient in *Mutual Life Ins. Co. v. Keen*, 135 Fed. 677, 68 C. C. A. 315, reversing (C. C.) 131 Fed. 559.

The sufficiency of the evidence to show acceptance of the application was considered in *Robinson v. Union Cent. Life Ins. Co.* (C. C.) 144 Fed. 1005; *Quill v. Boston Ins. Co.*, 197 Mass. 216, 83 N. E. 401; *France v. Mutual Life Ins. Co.*, 55 Or. 280, 106 Pac. 323; *Costello v. Grant County Mut. Fire & Lightning Ins. Co.*, 133 Wis. 361, 113 N. W. 639; *Royal Ins. Co. v. O. L. Walker Lumber Co.*, 24 Wyo. 59, 155 Pac. 1101, Ann. Cas. 1917E, 1174, affirming judgment on rehearing 23 Wyo. 264, 148 Pac. 340.

Where oral application for mutual fire insurance was made to agent who accepted payment of premium and fee, the question of the acceptance of such application was for the jury, where the charter

did not expressly forbid an oral application. *Leonard v. Farmers' Mut. Fire Ins. Co. of Monroe and Wayne Counties*, 192 Mich. 230, 158 N. W. 1041.

426-428. (h) Same—Effect of delay in acceptance or failure to give notice of rejection

427 (h). An acceptance of the application cannot be implied from the mere delay of the insurer to act on the application.

This rule is supported by *Northwestern Mut. Life Ins. Co. v. Neafus*, 145 Ky. 563, 140 S. W. 1026 36 L. R. A. (N. S.) 1211; *Ripka v. Mutual Fire Ins. Co.*, 36 Pa. Super. Ct. 517; *Richmond v. Travelers' Ins. Co.*, 123 Tenn. 307, 130 S. W. 790, 30 L. R. A. (N. S.) 954; *National Union Fire Ins. Co. v. School Dist. No. 55*, 122 Ark. 179, 182 S. W. 547, L. R. A. 1916D, 238. But see *Wilken v. Capital Fire Ins. Co.*, 99 Neb. 828, 157 N. W. 1021; *Duffle v. Bankers' Life Ass'n*, 160 Iowa, 19, 139 N. W. 1087, 46 L. R. A. (N. S.) 25.

The silence of the company in such cases cannot create an estoppel, unless the applicant has been misled into believing that the application will be accepted, and has in reliance thereon refrained from obtaining other insurance (*Richmond v. Travelers' Ins. Co.*, 123 Tenn. 307, 130 S. W. 790, 30 L. R. A. [N. S.] 954). So, too, though the agent may have written up the policy, if he retains it in his possession awaiting advices from the insurer, the mere fact that the applicant did not receive notice of rejection gives him no rights, if in fact the risk was rejected (*Hartford Fire Ins. Co. v. Whitman*, 75 Ohio St. 312, 79 N. E. 459, 9 Ann. Cas. 218).

428-431. (i) Effect of acceptance or approval

428 (i). In the absence of stipulations requiring some other act to be done, an acceptance by the insurer of the distinct proposal made by the applicant completes the contract, whether a policy is issued or not.

Brotherhood of Locomotive Firemen and Enginemen v. Corder, 52 Ind. App. 214, 97 N. E. 125; *Tuttle v. Iowa State Traveling Men's Ass'n*, 104 N. W. 1131, 132 Iowa, 652, 7 L. R. A. (N. S.) 223; *Birch v. Manufacturers' Liability Ins. Co. of New Jersey*, 96 Atl. 1003, 88 N. J. Law, 655. As to sufficiency of evidence, see *Ferrar v. Western Assur. Co.*, 159 Pac. 609, 30 Cal. App. 489, application for rehearing in Supreme Court denied 159 Pac. 611, 30 Cal. App. 489.

And where the application stipulated that the insurance should be in force from the day of approval of the application, but that the application should not be considered as a contract of insurance

until approved by the company and evidenced by delivery of the policy, the contract became complete on approval of the application; delivery of the policy having failed through mistake or negligence of the agent (*Van Arsdale-Osborne Brokerage Co. v. Cooper*, 28 Okl. 598, 115 Pac. 779).

In *Rancipher v. Women of Woodcraft*, 50 Wash. 68, 96 Pac. 829, the laws of the society provided that any member in good standing, having a benefit certificate for less than \$2,000, could increase the certificate by application, surrendering the old certificate, being examined by the circle physician, paying his fee, and paying a fee of \$1 to the circle clerk. If the application was approved by the grand physician, a new certificate should be issued. It was held that there was no reservation of discretion as to the issuing of a new certificate upon compliance with the conditions, but the approval of the grand physician fixed the status of the applicant and of the contract, and the issuance of the certificate thereafter was a mere ministerial matter, and hence, where after an applicant for an increase in the amount of benefits had complied with the conditions prescribed, and had died after the new certificate was issued, but while it was being held pending investigation of her alleged poor health at the time, the society was liable on the certificate, though it had not been delivered.

Where an applicant died before his medical examination reached the chief medical officer, its subsequent approval, by such officer in ignorance of the death created no liability against the association (*Erickson v. Brotherhood of Locomotive Firemen & Engineers*, 129 Minn. 264, 152 N. W. 537).

Where deceased was recognized as a member of a foreign fraternal insurer, his failure to pass medical examination, as required by a statute of state of the insurer's domicile, precludes recovery. *Ulman v. Supreme Commandery of United Order of the Golden Cross of the World*, 220 Mass. 422, 107 N. E. 960.

431-432. (j) Rejection and notice thereof

431 (j). A rejection of the applicant's proposal for insurance terminates all contractual relations between the applicant and the insurer (*New York Life Ins. Co. v. Levy's Adm'r*, 122 Ky. 457, 92 S. W. 325, 5 L. R. A. [N. S.] 739), whether the applicant receives notice of the rejection or not (*Hartford Fire Ins. Co. v. Whitman*, 75 Ohio St. 312, 79 N. E. 459, 9 Ann. Cas. 218).

The sufficiency of the evidence of rejection is considered in *Robinson v. Union Cent. Life Ins. Co.* (C. C.) 144 Fed. 1005.

432-433. (k) Offer to insure and acceptance thereof

432 (k). A proposal by an insurance company to renew a policy must of course be accepted by the insured to bind the company, and such acceptance will not be implied from mere failure to decline the proposal (*Richmond v. Travelers' Ins. Co.*, 123 Tenn. 307, 130 S. W. 790, 30 L. R. A. [N. S.] 954). Thus, where an insurance company proposes by letter to renew a policy on conditions stated, and the insured retains the policy, but does not reply to the letter, or pay its premiums, or indicate an acceptance, until after a fire several months thereafter, there is no completed contract of insurance (*W. P. Harper & Co. v. Ginners' Mut. Ins. Co.*, 64 S. E. 567, 6 Ga. App. 139). So, too, where a conditional offer is made to execute a reinsurance contract, there is no contract until the offer is accepted with its conditions and the writing executed and delivered (*Spande v. Western Life Indemnity Co.*, 61 Or. 220, 122 Pac. 38, affirming judgment on rehearing 61 Or. 220, 117 Pac. 973).

433 (k). The offer to insure may be in the form of a counter proposition to the application, which is practically rejected. If such counter proposition is accepted and the premium specified therein paid, the contract becomes complete (*Carter v. Bankers' Life Ins. Co.*, 83 Neb. 810, 120 N. W. 455).

Where assured's application had been rejected, his silence regarding company's proposal to later accept him is not an acceptance, since he was under no duty to speak. *Texas Life Ins. Co. v. Huntsman* (Tex. Civ. App.) 193 S. W. 455.

433-435. (l) Matters peculiar to mutual benefit associations

434 (l). The approval of a membership application by the supreme medical director of a fraternal benefit association is a condition precedent to membership, and, where applicant was accidentally killed earlier in the day on which such approval was given, he did not become a member (*Patterson v. Supreme Commandery, United Order of Golden Cross of the World*, 71 Atl. 1016, 104 Me. 355). To the same effect is *Brotherhood of Locomotive Firemen v. Hand*, 90 Miss. 893, 44 South. 161.

The failure of an applicant to present himself for another medical examination after an illness occurring subsequent to his application but prior to his initiation, as required by the by-laws, not having been specially pleaded, will not be considered. *Harris v. Knights and Ladies of Honor*, 108 S. W. 130, 129 Mo. App. 163.

The laws of mutual benefit associations usually require that an applicant for membership shall within a certain period after his election present himself for initiation or forfeit his election. Consequently one who is not duly initiated according to the ritual of the order does not become a member, so as to be entitled to a benefit certificate. Such rules are part of the contract and must be complied with before there can be any liability on the part of the association.

Supreme Lodge, Knights and Ladies of Honor, v. Johnson, 81 Ark. 512, 99 S. W. 834; Arrison v. Supreme Council of Mystic Tollers, 129 Iowa, 303, 105 N. W. 580; Bruner v. Brotherhood of American Yeomen, 136 Iowa, 612, 111 N. W. 977; Kolosinski v. Modern Brotherhood of America, 175 Mich. 684, 141 N. W. 589; Loyd v. Modern Woodmen of America, 87 S. W. 530, 113 Mo. App. 19; Porter v. Loyal Americans of the Republic, 167 S. W. 578, 180 Mo. App. 538; Gilmore v. Modern Brotherhood of America, 186 Mo. App. 445, 171 S. W. 629; Shartle v. Modern Brotherhood of America, 139 Mo. App. 433, 122 S. W. 1139; Loudon v. Modern Brotherhood of America, 107 Minn. 12, 119 N. W. 425; Loyal Mystic Legion of America v. Richardson, 76 Neb. 562, 107 N. W. 795; Driscoll v. Modern Brotherhood of America, 77 Neb. 282, 109 N. W. 158; McWilliams v. Modern Woodmen of America (Tex. Civ. App.) 142 S. W. 641. But see Brown v. Bowman, 10 Ga. App. 707, 73 S. E. 1078, where under the circumstances of the case it was held that initiation was not necessary to fix liability of insured on a note given for the premium.

Under Code Iowa 1897, § 1822, a fraternal association need not require members to be initiated in order to entitle them to recover on their certificates. Schworm v. Fraternal Bankers' Reserve Society, 168 Iowa, 579, 150 N. W. 714, Ann. Cas. 1917B, 373.

Where the authority of the grand medical examiner of a fraternal order, under its constitution and by-laws, extended to determination of the physical qualifications of an applicant and to ascertainment as to the sufficiency of the application, he had no authority to reject a candidate solely on the ground that he was not initiated within the prescribed time. Brotherhood of Locomotive Firemen & Enginemen v. Corder, 52 Ind. App. 214, 97 N. E. 125.

435 (1). The failure to comply with the regulation of the association in regard to initiation is not excused by the illness or death of the applicant.

Reference may be made to Loudon v. Modern Brotherhood of America, 107 Minn. 12, 119 N. W. 425; Shartle v. Modern Brotherhood of America, 122 S. W. 1139, 139 Mo. App. 433; Loyal Mystic Legion of America v. Richardson, 107 N. W. 795, 76 Neb. 562.

If the application for membership has not been properly approved by the authorized officers, initiation is not a substitute therefor (*Norman v. Order of United Commercial Travelers*, 163 Mo. App. 175, 145 S. W. 853). If, however, under the by-laws of a fraternal beneficiary association, a person may become a member by being obligated in the first degree, where a certificate is issued on such obligation, the association cannot defeat a recovery on the certificate by denying membership (*Fisher v. Supreme Lodge Knights and Ladies of Honor*, 190 Mo. App. 606, 176 S. W. 269).

A mutual benefit association may waive the requirement for initiation (*Brotherhood of Locomotive Firemen & Enginemen v. Corder*, 52 Ind. App. 214, 97 N. E. 125). But the intention to waive the requirement must clearly appear. In *Bruner v. Brotherhood of American Yeomen*, 136 Iowa, 612, 111 N. W. 977, it appeared that after a candidate for membership in a mutual benefit society had been notified to appear for initiation, but before doing so, notice of a monthly assessment was sent to him. The chief correspondent of the order informed him that his certificate was in the hands of the secretary of the local order, and he attempted, without success, to find the local secretary for the purpose of paying dues, after which an entry of his suspension was made in one of the books of the order by the local secretary for nonpayment of such dues. It was held that such acts did not constitute a waiver of the ceremony of initiation necessary to complete the membership.

The mere retention by the association of assessments paid or initiation dues does not constitute a waiver.

Patterson v. Supreme Commandery United Order of Golden Cross of the World, 104 Me. 355, 71 Atl. 1016; *Driscoll v. Modern Brotherhood of America*, 77 Neb. 282, 109 N. W. 158. The sufficiency of the evidence to show a waiver of the requirement as to initiation was considered in *Brotherhood of Locomotive Firemen and Enginemen v. Corder*, 52 Ind. App. 214, 97 N. E. 125.

Unless the laws of the order provide otherwise, the contract between the member and the association is not complete until a certificate is issued (*Supreme Lodge, K. P., v. Graham*, 49 Ind. App. 535, 97 N. E. 806). A mutual benefit society may, therefore, before the issuance of a membership certificate rescind its action in electing the applicant as a member (*Dunn v. Knights of Gideon Mut. Aid Soc.*, 151 N. C. 133, 65 S. E. 761).

6. COMPLETION OF CONTRACT—EXECUTION OF POLICY**436-438. (a) Necessity and sufficiency of execution**

436 (a). In Georgia, where the statute (Civ. Code 1895, § 2089) requires contracts of insurance to be in writing, such contracts must of course be signed by the insurer or some duly authorized officer (*Delaware Ins. Co. v. Pennsylvania Fire Ins. Co.*, 126 Ga. 380, 55 S. E. 330, 7 Ann. Cas. 1134). It has been held in Nebraska (*Carter v. Bankers' Life Ins. Co.*, 83 Neb. 810, 120 N. W. 455), that Acts 1903, p. 332, c. 52, § 15, requiring a life policy to be signed by the president or vice president and by the secretary or assistant secretary, applies only to companies formed under that act on the mutual level premium legal reserve plan. The constitution of a fraternal insurance association is a part of the contract between it and its members, and where it provides that no beneficiary certificate shall be effective unless executed by the supreme president and supreme secretary and countersigned by the president and secretary of the local council and the conditions accepted by the member in writing on his certificate, a monthly assessment paid when an application is made for membership cannot be applied before such constitutional provisions have been complied with (*Triple Tie Benefit Ass'n v. Wood*, 84 Pac. 565, 73 Kan. 124).

Rider on accident policy, excluding liability for injuries from act of belligerent nation, need not be signed by insurer. *Hopkins v. Connecticut General Life Ins. Co.*, 158 N. Y. Supp. 79, judgment reversed 160 N. Y. Supp. 247, 174 App. Div. 23.

The usual and proper place for the signature to a policy of fire insurance is at the end of the matter which it attests, but it will suffice if, with the intent to constitute a signing, the signature is inserted in another place (*Delaware Ins. Co. v. Pennsylvania Fire Ins. Co.*, 55 S. E. 330, 126 Ga. 380, 7 Ann. Cas. 1134).

Where the power of attorney given by the underwriters of a Lloyd's association to three attorneys recites that it is made by and between "each" of the parties of the first part (underwriters) and by and between "each" of the parties of the second part (the attorneys), such power grants a joint and several power to the attorneys to issue policies, and a policy issued by two of them is binding (*Unterberg v. Elder*, 134 N. Y. Supp. 242, 149 App. Div. 647, reversing judgment 130 N. Y. Supp. 166, 72 Misc. Rep. 363).

437 (a). Policies of fidelity insurance often contain a provision that they must be signed by the employé whose fidelity is insured. If the policy or bond so provides the signing of the bond by the employé was a condition precedent to liability of the surety thereon (*Oklahoma Sash & Door Co. v. American Bonding Co.* [Okl.] 153 Pac. 1151). But in the absence of such a stipulation the failure of the employé to sign did not render the bond unenforceable by the beneficiary against the surety (*Title Guaranty & Surety Co. v. Bank of Fulton*, 117 S. W. 537, 89 Ark. 471, 33 L. R. A. [N. S.] 676).

In *Delaware Ins. Co. v. Pennsylvania Fire Ins. Co.*, 126 Ga. 380, 55 S. E. 330, 7 Ann. Cas. 1134, the petition alleged that defendant insurance company reinsured plaintiff company in a certain amount on a risk which plaintiff had taken; that a copy of the contract of reinsurance was attached as an exhibit to the petition; that defendant executed and delivered to plaintiff such paper as and for a written contract of insurance, and that it was so received and the premium due thereon paid. The paper so exhibited commenced with the name of defendant and its general agent, and proceeded, "do reinsure the plaintiff." It was held that the petition sufficiently showed that the paper was signed. The execution of a contract of insurance is a question of fact, which must be pleaded if the insurer desires to put the execution in issue (*Williams v. New York Life Ins. Co.*, 89 Atl. 97, 122 Md. 141). Where, in an action on a life insurance policy, the complaint is in the Code form, and there is no plea denying the execution of the policy, plaintiff makes out a prima facie case by introducing the policy and proving the death of the assured, and that defendant had notice thereof (*Manhattan Life Ins. Co. v. Verneuille*, 156 Ala. 592, 47 South. 72). Where plaintiff established a prima facie case by proving that he was in possession of the policy executed and delivered to him by defendant's agent, the filing of a verified plea by defendant denying the execution of the policy did not destroy the legal presumption creating the prima facie case, but merely entitled defendant to offer evidence to meet the prima facie case by proving its contention that the policy was never executed (*Helbig v. Citizens' Ins. Co.*, 84 N. E. 897, 234 Ill. 251, affirming 138 Ill. App. 115). A denial that defendant issued the policy "in the terms or to the purport stated in the petition," is sufficient as a specific denial of the execution of the policy (*Cooper v. American Cent. Ins. Co.*, 123 S. W. 497, 139 Mo. App. 570). A verified plea of the general issue casts on plaintiff the

burden of proving the execution of the policy (*Citizens' Ins. Co. v. Helbig*, 138 Ill. App. 115, affirmed in 234 Ill. 251, 84 N. E. 897). Evidence is not admissible to show that the fire policy sued on was not executed by the company where the pleadings admitted execution (*Citizens' Mut. Fire Ins. Co. of Cecil County v. Conowingo Bridge Co.*, 82 Atl. 372, 116 Md. 422).

438-439. (b) Necessity of seal

439 (b). In *Morrill's Adm'x v. Catholic Order of Foresters*, 79 Vt. 479, 65 Atl. 526, the certificate, issued by a mutual benefit society, was headed by the name of the society, and recited that it was issued to a member of a subordinate lodge, and that "in witness whereof" the society had "affixed its seal and caused" the certificate to be signed by its chief officer and attested by its secretary. It was signed by its chief officer and attested by its secretary and witnessed. A wafer was attached, on which was stamped the name of the society and its emblem and the date of its organization. It was held, in the absence of evidence to the contrary, that the seal was the seal of the society, and regularly attached so as to make the certificate an instrument under seal.

439-441. (c) Countersigning by agent

439 (c). That a policy shall be countersigned by the agent of the company before it shall become a valid obligation is a stipulation which the company has a right to make (*Fidelity & Casualty Co. v. Walton*, 24 Okl. 671, 104 Pac. 909). And in the case of life policies the countersigning by the agent during the lifetime of the insured is essential to the validity of the contract.

Reference may be made to *Caywood v. Supreme Lodge of Knights and Ladies of Honor*, 171 Ind. 410, 86 N. E. 482, 23 L. R. A. (N. S.) 304, 131 Am. St. Rep. 253, 17 Ann. Cas. 503; *Fidelity & Casualty Co. of New York v. Walton*, 24 Okl. 671, 104 Pac. 909; *Dickey v. Continental Casualty Co.*, 89 S. W. 436, 40 Tex. Civ. App. 199; *Sterling v. Head Camp*, Pacific Jurisdiction. *Woodmen of the World*, 28 Utah, 505, 80 Pac. 375, rehearing denied 28 Utah, 526, 80 Pac. 1110.

Where fire policy issued by foreign company is not valid till countersigned by local agent, such agent is issuing agent, in view of Rev. Laws Okl. 1910, § 3434, though policy provided it should not be valid till countersigned by secretary or assistant secretary at Chicago (*Home Ins. Co. of New York v. Mobley* [Okl.] 157 Pac. 324). The Washington statute (3 Rem. & Bal. Code, § 6059-36),

making it unlawful for an insurance company to write a policy unless countersigned by its duly authorized agent, does not make a policy signed by one assuming to act as agent, void, though he was not its licensed agent (*Violette v. Insurance Co. of the State of Pennsylvania*, 159 Pac. 896, 92 Wash. 685, rehearing denied 161 Pac. 343, 92 Wash. 685).

441 (c). A clause in a policy providing that the contract shall not be valid unless countersigned by agent of company at place where insured resides may be waived (*Rogers v. American Nat. Ins. Co.*, 89 S. E. 700, 145 Ga. 570). Though a provision of a mutual benefit certificate, requiring it to be countersigned by an officer of the subordinate lodge, can be waived by the company, the mere possession thereof by insured without being so countersigned will not raise a presumption that the requirement was waived (*Caywood v. Supreme Lodge of Knights & Ladies of Honor*, 171 Ind. 410, 86 N. E. 482, 23 L. R. A. [N. S.] 304, 131 Am. St. Rep. 253, 17 Ann. Cas. 503).

7. COMPLETION OF CONTRACT—DELIVERY AND ACCEPTANCE OF POLICY

442-445. (a) Necessity of delivery of policy

442 (a). Actual delivery of the policy to the insured is not essential to the validity of the contract unless made so by its terms.

Stephenson v. Allison, 165 Ala. 238, 51 South. 622, 138 Am. St. Rep. 26; *International Ferry Co. v. American Fidelity Co.*, 101 N. E. 160, 207 N. Y. 350, reversing judgment 129 N. Y. Supp. 1129, 145 App. Div. 906; *Roberta Mfg. Co. v. Royal Exchange Assur. Co.*, 161 N. C. 88, 78 S. E. 865; *Hartford Fire Ins. Co. v. Whitman*, 79 N. E. 459, 75 Ohio St. 312, 9 Ann. Cas. 218; *Van Arsdale-Osborne Brokerage Co. v. Robertson*, 36 Okl. 123, 128 Pac. 107; *Wheaton v. Liverpool & London & Globe Ins. Co.*, 20 S. D. 62, 104 N. W. 850.

The principle is also asserted in the following cases involving life insurance contracts: *Metropolitan Life Ins. Co. v. Thompson* (Ga. App.) 93 S. E. 299; *Massachusetts Mut. Life Ins. Co. v. Boswell* (Ga. App.) 93 S. E. 95; *Crohn v. Order of United Commercial Travelers of America*, 156 S. W. 472, 170 Mo. App. 273; *Powell v. North State Mut. Life Ins. Co.*, 153 N. C. 124, 69 S. E. 12; *Great Hive, Ladies of Modern Maccabees, v. Hodge*, 130 Ill. App. 1; *Devine v. Federal Life Ins. Co.*, 250 Ill. 203, 95 N. E. 174.

If there is a binding contract of insurance, the fact that the policy is not delivered until after a loss occurred does not defeat in-

sured's right to recover under the contract (*El Dia Ins. Co. v. Sinclair*, 228 Fed. 833, 143 C. C. A. 231).

444 (a). If, however, the contract is not otherwise complete, there must be a delivery of the policy, either actual or constructive.

Hill v. Supreme Ruling of the Fraternal Mystic Circle, 164 Ill. App. 217; *Arrison v. Supreme Council of Mystic Tillers*, 105 N. W. 580, 129 Iowa, 303; *Wilson v. Interstate Business Men's Accident Ass'n*, 160 Iowa, 184, 140 N. W. 860; *Bowen v. Prudential Ins. Co. of America*, 178 Mich. 63, 144 N. W. 543, 51 L. R. A. (N. S.) 587; *Rhodius v. Kansas City Life Ins. Co.*, 137 S. W. 907, 156 Mo. App. 281; *Tainter v. Central States Life Ins. Co. (Mo. App.)* 185 S. W. 1185; *Kirk v. Sovereign Camp of Woodmen of the World*, 155 S. W. 39, 169 Mo. App. 449; *Pierce v. New York Life Ins. Co.*, 174 Mo. App. 383, 160 S. W. 40; *Powell v. North State Mut. Life Ins. Co.*, 69 S. E. 12, 153 N. C. 124; *Hartford Fire Ins. Co. v. Whitman*, 75 Ohio St. 312, 79 N. E. 459, 9 Ann. Cas. 218; *Modern Woodmen of America v. Owens*, 60 Tex. Civ. App. 398, 130 S. W. 858; *American Home Life Ins. Co. v. Melton (Tex. Civ. App.)* 144 S. W. 362.

The provision that there must be a delivery to render the policy effective may of course be waived. *Pierce v. New York Life Ins. Co.*, 174 Mo. App. 383, 160 S. W. 40.

The fact that a life policy was actually issued and marked "approved" did not make it a valid contract where there had been no delivery to applicant and policy was issued at a different premium rate than that named in the application (*State ex rel. Equitable Life Assur. Soc. of United States v. Robertson [Mo.]* 191 S. W. 989). One having authority to take applications, receive premiums, and deliver policies after countersigning them cannot bind company save by delivery of policy issued by company (*Porter v. General Acc. Fire & Life Assur. Corp.*, 157 Pac. 825, 30 Cal. App. 198).

445 (a). The rule that there must be a delivery of the policy if there is a stipulation to that effect applies with special force where the provision is that the policy will not take effect unless it is delivered while the applicant is in good health (*Michigan Mut. Life Ins. Co. v. Thompson*, 44 Ind. App. 180, 86 N. E. 503). And to the same effect is *Yount v. Prudential Life Ins. Co. (Mo. App.)* 179 S. W. 749.

445-448. (b) Sufficiency and effect of delivery

445 (b). Subject to the qualification that an actual or implied acceptance of the policy by the insured is necessary, a valid deliv-

ery of the policy completes the contract and renders it binding on the parties.

Williams v. Empire Mut. Annuity & Life Ins. Co., 8 Ga. App. 303. 68 S. E. 1082; *German American Ins. Co. of New York v. Darrin*, 103 Pac. 87, 80 Kan. 578; *Hoover v. Bankers' Life Ass'n*, 155 Iowa, 322. 136 N. W. 117; *Rayburn v. Pennsylvania Casualty Co.*, 138 N. C. 379, 50 S. E. 762, 107 Am. St. Rep. 548; *Perry v. Security Life & Annuity Co.*, 63 S. E. 679, 150 N. C. 143.

That a policy of burglary insurance was returned for correction of mistakes due to the insurer's agent does not render the delivery ineffective (*New Amsterdam Casualty Co. v. New Palestine Bank*, 59 Ind. App. 69, 107 N. E. 554). But, if the policy is returned because of failure to pay the premium, the applicant is not entitled to recover, for want of a legal delivery of such policy (*Morriss v. Home Ins. Co.*, 139 N. Y. Supp. 674, 78 Misc. Rep. 303).

446 (b). As said in *Hardy v. Aetna Life Ins. Co.*, 154 N. C. 430, 70 S. E. 828, to constitute a good "delivery" it is not necessary that policies should have been in the actual possession of the insured, as delivery is largely a question of intention as evidenced by acts and words. The requisites of a valid delivery of an insurance policy are: An intention on the part of the person executing the policy to give legal effect to the completed instrument, and that this intention is evidenced by some word or act indicating that the insurer has put the instrument beyond his legal, though not necessarily beyond his physical, control, and the insured must acquiesce in this intention. To constitute a delivery of a policy there must be an intent to part with control over the instrument and to place it under the power of insured (*New v. Germania Fire Ins. Co.* [Ind. App.] 82 N. E. 1005, reversing on rehearing [Ind. App.] 81 N. E. 217). The words "in person," used in the constitution of a mutual benefit society directing that there shall be no liability until the insured shall have had delivered to him "in person" his beneficiary certificate are not synonymous with "manual possession," so as to require that the certificate be actually placed in insured's hands to constitute a legal delivery, but the provision is merely intended to require a delivery to insured himself, and not to another for him (*O'Neal v. Sovereign Woodmen of the World* [Ky.] 113 S. W. 52).

Delivery by an authorized agent of the insurer is of course sufficient (*Mutual Life Ins. Co. v. Reid*, 21 Colo. App. 143, 121 Pac.

132). In *Green v. Star Fire Ins. Co.*, 190 Mass. 586, 77 N. E. 649, it appeared that a foreign insurance company wrote the insurance commissioner that it had given certain persons authority "to appoint agents in the state," and requested the commissioner to issue licenses to the appointees of such persons, and agreed to be bound by their actions as if they were officers. Thereafter the persons in question wrote the insurance commissioner requesting the issuance of a license to M.; the letter containing no statement as to any limitations of M.'s authority. It was held that the delivery of a fire policy by M. to insured, after M. had been directed by the company not to do so, was binding on the company.

447 (b). The deposit in the post office, by the company, of a policy, with postage prepaid, directed to the insured or his agent, is a delivery of the policy.

Travelers' Fire Ins. Co. v. Globe Soap Co., 107 S. W. 386, 85 Ark. 169, 122 Am. St. Rep. 22; *Dupriest v. American Cent. Life Ins. Co.*, 97 Ark. 229, 133 S. W. 826; *Mutual Life Ins. Co. v. Reid*, 21 Colo. App. 143, 121 Pac. 132; *Williams v. Philadelphia Life Ins. Co.*, 105 S. C. 305, 89 S. E. 675.

448. (c) Same—Conditional delivery

448 (c). It is competent for the parties to agree on the conditional delivery of a policy, and there is no contract when such a delivery is shown and the condition has not been performed (*Perry v. Security Life & Annuity Co.*, 63 S. E. 679, 150 N. C. 143). An insurance company was bound by acts of its agent in excess of his authority in delivering subject to approval within 30 days a policy of casualty insurance containing a provision that it should take effect upon delivery (*Rivard v. Continental Casualty Co.* [Me.] 100 Atl. 101).

449-450. (d) Same—Delivery to and possession by agent

449 (d). Delivery of an insurance policy, to an authorized agent of the insured is a sufficient delivery to the principal.

American Fire Ins. Co. of Newark v. Minsker Realty Co., 144 N. Y. Supp. 305, 83 Misc. Rep. 1; *Singer v. National Fire Ins. Co. of Hartford, Conn.*, 139 N. Y. Supp. 375, 154 App. Div. 783.

So it has been held that the delivery of a fidelity bond by the insurer's agent to the employé whose fidelity was guaranteed, with intent that he should deliver such bond to his employer, is a suffi-

cient delivery (*Prosser Power Co. v. United States Fidelity & Guaranty Co.*, 73 Wash. 304, 132 Pac. 48).

As delivery to a third person on account of the insured is generally a sufficient delivery, a policy delivered to a mortgagee with the consent of the insured becomes effective, at least from the time of the acceptance of the application for insurance (*House v. Security Fire Ins. Co.*, 145 Iowa, 462, 121 N. W. 509).

The receipt of the policy by an agent of the insurer, to be unconditionally delivered by him to the insured, is tantamount to a delivery to the insured, though the agent never parts with the possession of the policy, and its delivery to the applicant is by contract essential to its validity.

This rule is sustained by *Payne v. Mutual Life Ins. Co. of New York*, 141 Fed. 339, 72 C. C. A. 487; *Farmers' Mut. Ins. Ass'n of Alabama v. Stewart*, 192 Ala. 23, 68 South. 254; *Title Guaranty & Surety Co. v. Bank of Fulton*, 117 S. W. 537, 89 Ark. 471, 33 L. R. A. (N. S.) 676; *New York Life Ins. Co. v. Pike*, 51 Colo. 238, 117 Pac. 899; *Rose v. Mutual Life Ins. Co. of New York*, 88 N. E. 204, 240 Ill. 45; *Mulligan v. Metropolitan Life Ins. Co.*, 149 Ill. App. 516; *Drago v. Prudential Ins. Co. of America*, 184 Ill. App. 618; *New York Life Ins. Co. v. Greenlee*, 42 Ind. App. 82, 84 N. E. 1101; *Thompson v. Michigan Mut. Life Ins. Co.*, 56 Ind. App. 502, 105 N. E. 780; *Unterharnscheidt v. Missouri State Life Ins. Co.*, 160 Iowa, 223, 138 N. W. 459, 45 L. R. A. (N. S.) 743; *Sutton v. Wright*, 94 Kan. 499, 147 Pac. 62; *Kilborn v. Prudential Ins. Co.*, 108 N. W. 861, 99 Minn. 176; *Gallagher v. Metropolitan Life Ins. Co.*, 67 Misc. Rep. 115, 121 N. Y. Supp. 638; *Van Arsdale-Osborne Brokerage Co. v. Cooper*, 115 Pac. 779, 28 Okl. 598; *Francis v. Mutual Life Ins. Co. of New York*, 55 Or. 280, 106 Pac. 323; *Riley v. Aetna Ins. Co. (W. Va.)* 92 S. E. 417, L. R. A. 1917E, 983. But see *Smith v. Commonwealth Life Ins. Co.*, 162 S. W. 779, 157 Ky. 146; *Snedeker v. Metropolitan Life Ins. Co.*, 169 S. W. 570, 160 Ky. 119.

That assured under a life policy was the insurer's local agent did not prevent a delivery of the policy to him from constituting a delivery to the assured so as to complete the transaction. *Gibson v. Pioneer Life Ins. Co.*, 168 S. W. 818, 181 Mo. App. 302.

So where plaintiff arranged with an insurance agent to reinsure on the expiration or cancellation of policies, a delivery of a new policy, obtained through another agency on cancellation of an existing policy, to such agent constituted a delivery to plaintiff (*Warren v. Franklin Fire Ins. Co.*, 161 Iowa, 440, 143 N. W. 554). And where insurer's agent is made the insured's agent to keep his prop-

erty insured, and is notified of the cancellation of a policy, a substituted policy is effective, without actual delivery to insured (*Hollywood Lumber & Coal Co. v. Dubuque Fire & Marine Ins. Co.* [W. Va.] 92 S. E. 858).

The fact that a member of an insurance agency firm, who was an officer of a corporation, retained physical possession of a policy issued by the firm on the property of the corporation, is material on the question of the issuance of the policy by insurer and acceptance by the corporation. *Roberta Mfg. Co. v. Royal Exchange Assur. Co.*, 161 N. C. 88, 76 S. E. 865.

Where a policy is deposited in the mail directed to the agent, with the intention of having it delivered by the agent to the insured unconditionally, the policy is deemed to have been delivered at the time it was placed in the mail.

Reference may be made to *Title Guaranty & Surety Co. v. Bank of Fulton*, 89 Ark. 471, 117 S. W. 537, 33 L. R. A. (N. S.) 676; *Unterharnscheidt v. Missouri State Life Ins. Co.*, 160 Iowa, 223, 138 N. W. 459, 45 L. R. A. (N. S.) 743; *Kilborn v. Prudential Ins. Co.*, 99 Minn. 176, 108 N. W. 861; *Francis v. Mutual Life Ins. Co.*, 55 Or. 280, 106 Pac. 323; *Massachusetts Mut. Life Ins. Co. v. Boswell* (Ga. App.) 93 S. E. 95; *Prudential Ins. Co. v. Shively*, 1 Ohio App. 238, 34 Ohio Cir. Ct. R. 357.

When there is a claim of fraud in the application, as well as in the procurement of the policy, it cannot be said that the transmission of the policy to the agent is the same as a delivery to the insured, without considering whether there was that mutuality of agreement and intention which excuses the actual delivery (*Fitzgerald v. Metropolitan Life Ins. Co.*, 90 Vt. 291, 98 Atl. 498). Where an insurance policy was mailed by insurer to the agent, who took the application but insured declined to receive it, unless it passed through the hands of another agent, there was no delivery, within a stipulation that the insurer should incur no liability until the policy was delivered to insured while in good health (*National Life Ass'n of Des Moines v. Speer*, 111 Ark. 173, 163 S. W. 1188).

Whether a policy completely executed by insurer and placed in the possession of its agent for delivery to insured is binding while in the possession of the agent depends on the nature of the agent's duty. If the insured has done everything necessary to entitle him to possession of the policy, and there rests on the agent merely the

ministerial duty of transferring the policy to insured, the agent holds the policy for insured, and it is binding on the parties without physical transfer (*New York Life Ins. Co. v. Greenlee*, 42 Ind. App. 82, 84 N. E. 1101).

450 (d). In view of the general rule that delivery to an agent is delivery to the insured, it has also been held that there is a delivery, sufficient to give effect to the insurance, though the agent retains the policy in his own possession for safe-keeping, and the policy is in fact never given into the actual possession of the insured.

Reference may be made to *Stephenson v. Allison*, 185 Ala. 238, 51 South. 622, 138 Am. St. Rep. 26; *Aetna Ins. Co. v. Renno*, 96 Miss. 172, 50 South. 563; *Wheaton v. Liverpool & London & Globe Ins. Co.*, 104 N. W. 850, 20 S. D. 62. And see *Devine v. Federal Life Ins. Co.*, 250 Ill. 203, 95 N. E. 174, where the policy was held by the agent as security for a personal loan. But compare *Cunningham v. Connecticut Fire Ins. Co.*, 200 Mass. 333, 86 N. E. 787.

So, too, where a policy was issued to a clerk of the insurance agent and was left for safe-keeping with the bank of which such agent was cashier, there was a sufficient delivery to give effect to the policy (*Marysville Mercantile Co. v. Home Fire Ins. Co.*, 21 Idaho, 377, 121 Pac. 1026).

Of course, if the agent holds the policy in his capacity as agent of the insurer, there is no delivery (*Bowen v. Mutual Life Ins. Co.*, 20 S. D. 103, 104 N. W. 1040). In *Walrath v. Hanover Fire Ins. Co.*, 139 App. Div. 407, 124 N. Y. Supp. 54, it appeared that shortly before the expiration of a fire policy on plaintiff's property, issued by defendant through its agent R., and in the possession of the mortgagee of the property, R., whose agency had been revoked, applied to the then agents of defendant for a policy continuing the insurance, and they delivered it to him; but he returned it to them on their demand, before the time it was to take effect, defendant having instructed them to withdraw it, as they had ceased insuring that class of property. It was held that even if plaintiff was not informed that R. was no longer defendant's agent, and was told by R. that a new policy had been issued and delivered to the mortgagee, and was not informed of the withdrawal, he could not recover as on such policy, on the ground of the estoppel of defendant to dispute its delivery.

450-451. (e) Same—Mutual benefit certificates

450 (e). The rule stated in the original text, that in the case of mutual benefit certificates a delivery of the certificate to the proper officer of the local lodge for delivery to the member is sufficient to give the certificate effect, is also supported by *O'Neal v. Sovereign Woodmen of the World*, 130 Ky. 68, 113 S. W. 52. In this case the certificate issued to insured on his application was received by the clerk of insured's local camp, when a mistake in the number of the camp was discovered. Insured was directed to appear for initiation, and was regularly initiated, and paid all the dues and assessments, but the clerk returned the certificate to the sovereign camp for correction, and, before a corrected certificate was returned and delivered to insured, he was killed. It was held that, when insured was initiated and had paid the dues, the clerk held the original certificate, which was a valid instrument notwithstanding the error, for him and that such acts constituted a delivery of the original certificate to assured personally as required by the society's constitution in order to initiate defendant's liability.

It was, however, held in *Modern Woodmen of America v. Owens*, 60 Tex. Civ. App. 398, 130 S. W. 858, that the receipt of the benefit certificate by the clerk of the local camp was not a delivery to the insured, as such clerk is the agent of the association and not of the member. It is to be remarked, however, that in this case the clerk was not to deliver the certificate to the member unless at the time of such delivery he was in good health. Other provisions of the laws of the association may affect the question of delivery. Thus, where the laws of the association provide that the initiation of the applicant is a condition precedent to membership, or to the delivery of the certificate, a delivery of the certificate to the clerk of the local lodge, or even to the member himself, prior to his initiation, is ineffective to bind the association.

This rule is supported by *Loyd v. Modern Woodmen of America*, 113 Mo. App. 19, 87 S. W. 530; *Driscoll v. Modern Brotherhood of America*, 77 Neb. 282, 109 N. W. 158; *McWilliams v. Modern Woodmen of America* (Tex. Civ. App.) 142 S. W. 641.

451-453. (f) Same—Condition requiring delivery while insured is in good health

451 (f). An insurance company may lawfully stipulate that no obligation is assumed under the policy, unless on the date of the delivery thereof the insured is alive and in sound health (*Metro-*

politan Life Ins. Co. v. Willis, 76 N. E. 560, 37 Ind. App. 48). The purpose of such stipulations is to protect the insurer from liability in consequence of disease contracted subsequent to the application, and before a delivery of the policy (Johnson v. Royal Neighbors of America, 97 N. E. 1084, 253 Ill. 570, affirming judgment 159 Ill. App. 269). Under a condition that the policy shall not take effect until delivery has been made while insured is living and in good health, a delivery will impose no liability on the insurer unless at the time the insured is in good health.

Reference may be made to Clinton v. Modern Woodmen of America, 125 Ark. 115, 187 S. W. 939; Southern Life Ins. Co. v. Hill, 70 S. E. 186, 8 Ga. App. 857; Michigan Mut. Life Ins. Co. v. Thompson, 44 Ind. App. 180, 86 N. E. 503; Bell v. Missouri State Life Ins. Co., 166 Mo. App. 390, 149 S. W. 33; Stephens v. Metropolitan Life Ins. Co., 190 Mo. App. 673, 176 S. W. 253; Yount v. Prudential Life Ins. Co. (Mo. App.) 179 S. W. 749; Carmichael v. John Hancock Mut. Life Ins. Co., 101 N. Y. Supp. 602, 118 App. Div. 291, reversing 49 Misc. Rep. 461, 97 N. Y. Supp. 976; American Bankers' Ins. Co. v. Thomas (Okl.) 154 Pac. 44; Lathrop v. Modern Woodmen of America, 56 Or. 440, 106 Pac. 328, rehearing denied 56 Or. 440, 109 Pac. 81; Modern Woodmen of America v. Owens, 80 Tex. Civ. App. 398, 130 S. W. 858; Metropolitan Life Ins. Co. v. Betz, 44 Tex. Civ. App. 557, 99 S. W. 1140. But see New York Life Ins. Co. v. Pike, 51 Colo. 238, 117 Pac. 899, where policy had been sent to agent for delivery to insured.

The condition of life policy that no obligation was assumed by defendant unless on day of issue insured was alive and in sound health was controlled by the "misrepresentation statute," Rev. St. 1909, § 6937. Hicks v. Metropolitan Life Ins. Co. (Mo. App.) 190 S. W. 661.

The provision does not require that insured, at time of approval of his application and of issuance and delivery of his policy should be in same condition of health as he was when he signed his application; requirement as to health being that insured should be in same condition when first premium is paid as he was at date of application. Massachusetts Mut. Life Ins. Co. v. Boswell (Ga. App.) 93 S. E. 95.

Under the condition providing that no obligation is assumed by the insurer unless at the date of the policy the insured is alive and in sound health, the fact of the sound health of insured at such time is what determines the liability of insurer, and not the apparent health of insured, nor any one's belief that insured was in sound health at such time (Sulski v. Metropolitan Life Ins. Co., 196 Ill. App. 76, affirmed Seaback v. Same, 113 N. E. 862, 274 Ill.

516). The rule that receipt by an agent from his insurance company of a policy to be unconditionally delivered by him to the applicant is in law a delivery to the applicant, though the agent never surrender possession of the policy, and though its delivery to the applicant be by contract made essential to its delivery, does not apply, where the first premium has not been paid to the company or its agent, and the applicant was so seriously ill when the policy was received by the company's agent that she afterwards died, and the policy and application provided that the policy should not take effect unless the first premium was paid and insured was in good health at the time the policy was delivered to her (*Michigan Mut. Life Ins. Co. v. Thompson*, 44 Ind. App. 180, 86 N. E. 503). Where the application requires delivery of policy while applicant was in good health, mailing of policy to local agent, with directions not to deliver unless applicant was in good health, is not a delivery (*Missouri State Life Ins. Co. v. Burton* [Ark.] 195 S. W. 371). A benefit insurance certificate, which was not received by the society's local officers until several days after the applicant's initiation and was not delivered because the applicant had in the meantime been taken to a hospital suffering from general paresis from which he subsequently died, is not binding in view of the society's rules (*Court of Honor v. Hering*, 178 Mich. 377, 144 N. W. 843).

In *Hills' Adm'r v. Penn Mut. Life Ins. Co.* (Ky.) 90 S. W. 544, it was held that there was no completed contract on the following facts: An applicant for life insurance gave the agent his note, on an understanding that it should be accepted as payment of the first premium. The application was rejected, and the agent then arranged with another agent for the making of an application to the latter's company on an understanding that, in case of acceptance, the note was to be discounted and used to pay the premium. The policy was issued, and provided that the company incurred no liability until delivery and payment during the good health of insured. The policy was delivered to the agent for the first company, who delivered the note to the other agent; but, subsequently learning that insured was ill, a redelivery of the policy and notes took place between the agents and the policy was returned to the company.

452 (f). A provision in a life policy that it shall not be effective until delivered while insured is in good health may be waived by the company or its authorized agent, and if the condition is waived.

the contract becomes complete on acceptance by the insured, though he is then in bad health (*Bell v. Missouri State Life Ins. Co.*, 166 Mo. App. 390, 149 S. W. 33).

Failure of insured to inform the company when a policy was delivered that since his application he had been confined in a sanitarium was not a fraud on the company, where neither the application nor the policy provided that it should take effect only in case insured was in sound health at the time of its delivery (*New York Life Ins. Co. v. Moats*, 207 Fed. 481, 125 C. C. A. 143). And in the same case it was said that where a policy, by its express terms, related back to the time of the application, and did not require that the insured be in sound health at the time of delivery, the company assumed the risk of a change in the health of insured between the time of the application and the delivery of the policy.

Generally a waiver of the condition is implied by a delivery to the insured while he is not in good health, within the knowledge of the agent making the delivery.

The rule is supported by *Supreme Lodge K. P. v. Few*, 76 S. E. 91, 138 Ga. 778; *Modern Brotherhood of America v. Phelps*, 134 S. W. 892, 142 Ky. 544; *Sovereign Camp Woodmen of the World v. Dismukes* (Miss.) 38 South. 351; *Bell v. Missouri State Life Ins. Co.*, 149 S. W. 33, 166 Mo. App. 390.

In *Sovereign Camp, Woodmen of the World, v. Carrington*, 41 Tex. Civ. App. 29, 90 S. W. 921, it was held that the clerk of a local camp of a mutual benefit association, to whom a benefit certificate was intrusted for delivery, who had a discretion to withhold the benefit certificate during the sickness of the insured, and who represented that he had authority to deliver it to the mother of the insured, who had no notice of the association's by-laws or regulations, had authority to waive a provision in the benefit certificate, and in the constitution and by-laws of the association, that no liability should begin on the certificate until delivered to the insured in person and while in good health. So, too, the retention of the premium by the insurer ratifies its soliciting agent's waiver of a provision that the policy should not be effective until delivered to insured while in good health (*Bell v. Missouri State Life Ins. Co.*, 149 S. W. 33, 166 Mo. App. 390). And it has been held that, if insured was given credit for the first premium before he became in bad health, so as to operate as a constructive delivery of the policy, his subsequent illness would not defeat a recovery

on the policy (*Amarillo Nat. Life Ins. Co. v. Brown* [Tex. Civ. App.] 166 S. W. 658).

A condition in an application for an insurance policy that the company shall incur no liability under this application until it has been approved, the policy delivered, and the premium accepted by the company while the proposed is in good health, was not waived by the action of an agent who refused to deliver a policy to an applicant while sick in bed, but said he would deliver it on recovery, though he retained a certain small payment until the death of the applicant, which was in less than three weeks, for the company had a reasonable time in which to see whether the applicant was going to die (*McGregor v. Metropolitan Life Ins. Co.*, 136 S. W. 889, 143 Ky. 488).

It has been held in South Dakota that the provisions of Civ. Code S. D. § 731, estopping a life insurance company from setting up in defense to a policy that insured was not in good health at the issuing of the policy where the medical examiner has issued a certificate of health, are not limited in its application by the word "issuing" to the time of execution of a benefit certificate, but includes the delivery of the certificate to insured, and a certificate is not issued until delivered in the sense of that section (*Cunningham v. Royal Neighbors of America*, 24 S. D. 489, 124 N. W. 434, 140 Am. St. Rep. 793).

453 (f). "Good health" upon delivery of policy required by provision therein means that the applicant has no grave, important, or serious disease, and does not cover a mere temporary indisposition.

Mutual Life Ins. Co. of New York v. Morgan, 39 Okl. 205, 135 Pac. 279;
Life & Casualty Ins. Co. v. King, 137 Tenn. 685, 195 S. W. 585.

Following the rule laid down in *Metropolitan Life Ins. Co. v. Moore*, 117 Ky. 651, 79 S. W. 219, it was held in *Western & Southern Life Ins. Co. v. Davis*, 141 Ky. 358, 132 S. W. 410, that the condition as to delivery while in good health is not available to the insurer, where it was not claimed that the alleged unsoundness of health did not occur between the date of the application and medical examination and delivery of the policy. In such case the insured company must rely on the statements in the application to avoid a recovery.

Pregnancy is not per se a condition of unsound health, nor a disease, within the meaning of the provision as to delivery. Hence a

stipulation in a contract of fraternal insurance with a married woman that the policy should not take effect unless delivered to her "while in sound health" is not violated by reason of the applicant being pregnant at the time of delivery of the policy (*Rasicot v. Royal Neighbors of America*, 18 Idaho, 85, 108 Pac. 1048, 29 L. R. A. [N. S.] 433, 138 Am. St. Rep. 180).

453-455. (g) Same—Effect of death of insured or destruction of property before delivery

454 (g). If delivery is necessary to complete the contract, or the policy contains the condition that it shall not take effect unless delivered during the lifetime and good health of the insured, there can be no effective delivery after the death of the insured.

Alexander v. Woodmen of the World, 161 Ala. 561, 49 South. 883; *Powell v. Prudential Ins. Co. of America*, 153 Ala. 611, 45 South. 208; *Mutual Life Ins. Co. v. Jordan*, 111 Ark. 324, 163 S. W. 799, Ann. Cas. 1916B, 674; *Reserve Loan Life Ins. Co. v. Hockett*, 73 N. E. 842, 35 Ind. App. 89; *Commonwealth Life Ins. Co. v. Davis*, 136 Ky. 339, 124 S. W. 345; *Dennis v. Fidelity Mut. Life Ins. Co.*, 124 N. W. 575, 159 Mich. 594; *Modern Woodmen of America v. Owens*, 60 Tex. Civ. App. 398, 130 S. W. 858.

Conditions may arise, however, which will modify the rule stated above. Thus in *Starr v. Mutual Life Ins. Co.*, 41 Wash. 228, 83 Pac. 116, an application for a life policy was made on a printed form with none of the blanks filled, and provided that it was the basis and part of a proposed contract for insurance which should not take effect until the first premium had been paid during the continuance of the insured in good health and until the policy should have been issued. As a part of the same transaction and at the same time a binding receipt was executed, wholly in writing, reciting that the applicant had paid to the soliciting agent a certain sum, and that such agent had furnished the applicant with a binding receipt therefor, making the insurance in force from that date, provided that the application should be approved and the policy be duly signed by the secretary at the head office of the company and issued, and that such policy, if issued, should take effect as of the date of such receipt. It was held that the receipt controlled the application, which being accepted, a binding policy of insurance was created, though the policy was not actually issued at the home office of the company until after assured had died, and for that reason was never delivered. Similarly it has been held that the

condition is waived where the insurer, after the death of applicant and with knowledge of such death, accepts from its agent the premium collected by such agent from insured during his lifetime (*Rhodus v. Kansas City Life Ins. Co.*, 137 S. W. 907, 156 Mo. App. 281).

Of course, where a policy is sent to the agent for unconditional delivery to the insured, that is in itself sufficient delivery, and the fact that the policy does not come into the actual possession of the insured before his death does not render the delivery ineffectual.

O'Neal v. Sovereign Woodmen of the World, 130 Ky. 68, 113 S. W. 52; *Gallagher v. Metropolitan Life Ins. Co.*, 121 N. Y. Supp. 638, 67 Misc. Rep. 115; *Sovereign Camp, Woodmen of the World, v. Dees*, 45 Tex. Civ. App. 318, 100 S. W. 366. To the same effect, see *Lathrop v. Modern Woodmen of America*, 63 Or. 193, 126 Pac. 1002. But see *Michigan Mut. Life Ins. Co. v. Thompson*, 44 Ind. App. 180, 86 N. E. 503.

If the contract is otherwise complete, so that delivery is in fact unnecessary to give effect to a contract of fire insurance, the destruction of the property before delivery of the policy will not relieve the insurer from liability.

Reference may be made to *Travelers' Fire Ins. Co. v. Globe Soap Co.*, 107 S. W. 386, 85 Ark. 160, 122 Am. St. Rep. 22. *New v. Germania Fire Ins. Co.* (Ind. App.) 82 N. E. 1005, reversing on rehearing 81 N. E. 217; *Ætna Ins. Co. v. Renno*, 96 Miss. 172, 50 South. 563.

On the other hand, where insured applied for fire insurance, not intending to accept the policy if he could obtain a satisfactory one in another company, and there was no meeting of minds between him and the insurer as to the amount of the premium, the term of insurance, or as to the amount of concurrent insurance, he could not, by accepting delivery of the policy after a fire, insurer not knowing of the fire, bind insurer for the loss (*Nordness v. Mutual Cash Guaranty Fire Ins. Co.*, 22 S. D. 1, 114 N. W. 1092).

455 (g). The difficulty that arises when an attempt is made to substitute another policy for a prior one that has been canceled is illustrated by *Ætna Ins. Co. v. Renno*, 93 Miss. 594, 46 South. 947. The facts were these: On October 29th the M. Ins. Co. issued plaintiff a fire policy, which was delivered. On October 30th the company notified its agents to cancel the policy. The agents telephoned their subagents to cancel it and that they would try to rewrite the risk in another company. The subagents did not

notify plaintiff. The agents subsequently had the A. Ins. Co. issue a policy on the risk, which was delivered to the agents and was forwarded to the subagents for delivery. They did not deliver it to plaintiff, and the premises burned November 12th; plaintiff at the time being in possession of the M. Co.'s policy, and not having been notified of the instructions to cancel it, or of the substitution of the A. policy, which he learned after the fire, when he delivered to the subagents the M. policy and accepted the A. policy in its place, having been assured that he was fully protected, and paid the premium. It was held that the agents, in taking out the A. policy, acted without authority from plaintiff, and were not his agents, and, the true conditions not being known to the A. Co. until after the loss, it was too late for plaintiff to ratify the agents' unauthorized acts, so as to create liability under the policy.

In *Cunningham v. Connecticut Fire Ins. Co.*, 200 Mass. 333, 86 N. E. 787, it was held that there was no contract binding the defendant company on the following facts: A bankrupt applied to the agent of several insurance companies, including defendant, for a \$3,000 insurance on certain identified property. Nothing was said as to the companies in which the insurance was to be written, the amount, premiums, or term; nor was any binding slip issued. There was no further communication between the bankrupt and any one representing defendant insurance company until after the property sought to be insured was injured by fire. The agent wrote policies, all bearing the date of the application, in defendant and other companies, dividing the risk between stock and furniture. None of these policies were delivered, nor their contents communicated to the bankrupt, and the agent thereafter canceled \$2,000 of the insurance, and procured policies to that amount in other companies, which he did not represent. These policies, though written, were never delivered, and the bankrupt knew nothing concerning them until after the fire.

455-456. (h) Same—Questions of practice

455 (h). Where the complaint in an action on a benefit certificate alleged generally the performance of all its conditions, the general denial does not raise the issue of the performance of the conditions precedent that insured should be in sound health when the certificate was delivered; but the answer must specifically point out the condition and breach relied on (*Taylor v. Modern Wood-*

men of America, 84 Pac. 867, 42 Wash. 304, 7 Ann. Cas. 607). If delivery of a benefit certificate was not essential to the completion of the contract, a plea in an action on the certificate that such delivery was delayed by the negligence of defendant tendered an immaterial issue, and should have been stricken out on exception (*Modern Woodmen of America v. Owens*, 60 Tex. Civ. App. 398, 130 S. W. 858).

Where a policy is found in the possession of the insured, the presumption is that it was duly delivered by the insurance company.

This rule is stated in *National Mut. Fire Ins. Co. v. Sprague*, 92 Pac. 227, 40 Colo. 344; *Richardson v. Northwestern Mut. Life Ins. Co.*, 143 Ill. App. 279; *Gardner v. United Surety Co.*, 125 N. W. 264, 110 Minn. 291, 26 L. R. A. (N. S.) 1004.

The presumption also arises that the delivery was made while insured was in good health (*Mohr v. Prudential Ins. Co.*, 32 R. I. 177, 78 Atl. 554). The presumption as to delivery thus arising from possession may of course be rebutted (*Richardson v. Northwestern Mut. Life Ins. Co.*, 143 Ill. App. 279).

456 (h). Generally the burden is on the plaintiff to prove delivery.

Citizens' Ins. Co. v. Helbig, 138 Ill. App. 115, affirmed *Helbig v. Citizens' Ins. Co.*, 84 N. E. 897, 234 Ill. 251; *Lee v. Prudential Life Ins. Co.*, 203 Mass. 299, 89 N. E. 529, 17 Ann. Cas. 236; *Amos-Richia v. Northwestern Mut. Life Ins. Co.*, 143 Mich. 684, 107 N. W. 707; *Mohr v. Prudential Ins. Co.*, 32 R. I. 177, 78 Atl. 554.

But the burden of proving that the insured was not in good health when the policy was delivered is on the insurer (*Pelican v. Mutual Life Ins. Co. of New York*, 44 Mont. 277, 119 Pac. 778).

The admissibility of evidence to show delivery was considered in *Waters v. Security Life & Annuity Co.*, 144 N. C. 663, 57 S. E. 437, 13 L. R. A. (N. S.) 805, and *Sovereign Camp, Woodmen of the World, v. Carrington*, 41 Tex. Civ. App. 29, 90 S. W. 921.

The sufficiency of the evidence to show delivery was considered in *District Grand Lodge of Alabama v. Jones*, 59 South. 313, 5 Ala. App. 367; *Dupriest v. American Cent. Life Ins. Co.*, 97 Ark. 229, 133 S. W. 826; *Sovereign Camp Woodmen of the World v. Hall*, 104 Ark. 538, 148 S. W. 526, 41 L. R. A. (N. S.) 517; *Amos-Richia v. Northwestern Mut. Life Ins. Co.*, 143 Mich. 684, 107 N. W. 707; *National Mut. Fire Ins. Co. v. Sprague*, 92 Pac. 227, 40 Colo. 344; *Mut. Life Ins. Co. v. Reid*, 21 Colo. App. 143, 121 Pac. 132; *Wood*

v. Brotherhood of American Yeomen (Iowa) 113 N. W. 825; *New York Life Ins. Co. v. Greenlee*, 42 Ind. App. 82, 84 N. E. 1101; *Supreme Lodge K. P. v. Graham*, 49 Ind. App. 535, 97 N. E. 806; *New York Life Ins. Co. v. Manning*, 156 App. Div. 818, 124 N. Y. Supp. 775; *Hardy v. Aetna Life Ins. Co.*, 70 S. E. 828, 154 N. C. 430; *Francis v. Mutual Life Ins. Co. of New York*, 55 Or. 280, 106 Pac. 323; *Amos-Richia v. Northwestern Mut. Life Ins. Co. (C. C.)* 152 Fed. 192; *Equitable Life Assur. Society of United States v. Kitts' Adm'r*, 109 Va. 105, 63 S. E. 455.

The sufficiency of the evidence to show delivery was made while insured was in good health is considered in *Dupriest v. American Cent. Life Ins. Co.*, 97 Ark. 229, 133 S. W. 826

It is a question for the jury whether there has been such a delivery of the policy as to make it a binding contract.

Metropolitan Life Ins. Co. v. Williamson, 174 Fed. 116, 98 C. C. A. 90; *National Mut. Fire Ins. Co. v. Sprague*, 92 Pac. 227, 40 Colo. 344; *New v. Germania Fire Ins. Co. (Ind. App.)* 82 N. E. 1005; *Powell v. North State Mut. Life Ins. Co.*, 69 S. E. 12, 153 N. C. 124.

Under a life policy, conditioned that it should not be binding on the insurer unless at noon on the day of its date insured should be alive and in good and sound health, the policy being dated July 1st, and insured having died September 23d, and there being evidence that the primary cause of death was cancer, and the secondary cause was hemorrhage, and expert evidence that, if insured died of hemorrhage induced by cancer, he could not have been in good and sound health on July 1st, it was error to refuse an instruction that if insured was not in good and sound health July 1st, irrespective of whether he knew it, the policy never became effective (*Carmichael v. John Hancock Mut. Life Ins. Co.*, 95 N. Y. Supp. 587, 48 Misc. Rep. 386). Where the point in controversy in an action on a policy was whether the policy had been in fact issued, an instruction that the company admits that the insured applied for a policy, and that "they issued a policy, but never delivered it to him," is not erroneous, as the word "issue" was used in the sense of preparing and signing the policy, but did not include delivery (*Dargan v. Equitable Life Assur. Soc.*, 51 S. E. 125, 71 S. C. 356). The special finding that the life policy sued on had never been delivered to insured not being the determination of any ultimate fact, or of a fact having a controlling effect on an ultimate fact, it is not so inconsistent with, as to control, the general verdict for plaintiff (*Devine v. Federal Life Ins. Co.*, 95 N. E. 174, 250 Ill. 203).

457-458. (3) Necessity of acceptance

457 (i). To have a completed contract of insurance, insured must accept the policies (*Gray v. Blackwood*, 112 Ark. 332, 165 S. W. 958). And of course a provision in a policy that it should not go into effect until after the insured had notified the insurer of acceptance is binding upon the insured (*Miller v. Assured's Nat. Mut. Fire Ins. Co.*, 106 N. E. 203, 264 Ill. 380, affirming judgment 184 Ill. App. 271). The mere receipt of a proposed policy by insured, to determine whether he will accept it, does not complete the contract; the completion of the contract not depending upon manual possession of the policy, but upon the parties' intent, as shown by their acts or agreements (*New v. Germania Fire Ins. Co.*, 171 Ind. 33, 85 N. E. 703, 131 Am. St. Rep. 245). The insured is not bound to accept the policy if it varies in any way from the terms proposed in the preliminary negotiations.

The rule is supported by *American Ins. Co. v. Dillahunty*, 89 Ark. 416, 117 S. W. 245; *Empire Mut. Annuity & Life Ins. Co. v. Avery*, 59 S. E. 324, 3 Ga. App. 97; *Evans v. Central Life Ins. Co.*, 125 Pac. 86, 87 Kan. 641, 41 L. R. A. (N. S.) 1130; *Prince v. State Mut. Life Ins. Co.*, 77 S. O. 187, 57 S. E. 766.

However, if he is not satisfied with the terms and conditions of the policy submitted, it is his duty to reject it (*American Ins. Co. v. Dillahunty*, 89 Ark. 416, 117 S. W. 245). If the policy is rejected no duty rests on the insurer to notify the insured that it has canceled the policy (*Jefferson Fire Ins. Co. v. Greenwood* [Tex. Civ. App.] 141 S. W. 319). Where the application under which an accident policy was issued permitted applicant to reject and return the policy, if not satisfactory, there was no contract, where applicant rejected the policy within the time provided (*Business Men's Accident Ass'n of Texas v. Webb* [Tex. Civ. App.] 163 S. W. 380). A transfer by an insurance company of its business will justify rejection of the policies (*Chicago Life Ins. Co. v. Robertson*, 165 Ky. 217, 176 S. W. 1010).

458 (i). If the policy delivered varies in its terms from the proposal, it becomes in turn a counter proposition, and to constitute a binding contract must be accepted by the insured.

Reference may be made to *Wood v. Brotherhood of American Yeomen*, 140 Iowa, 98, 117 N. W. 1123, reversing on rehearing 113 N. W. 825; *New York Life Ins. Co. v. McIntosh*, 38 South. 775, 86 Miss. 236; *White v. Empire State Degree of Honor*, 47 Pa. Super. Ct. 52.

The above rule is especially applicable where, on directions to renew a policy, insurer substitutes therefor a policy in another company.

Such was the fact in *Waterloo Lumber Co. v. Des Moines Ins. Co.*, 158 Iowa, 563, 138 N. W. 504, 51 L. R. A. (N. S.) 539, and *Ferguson v. Northern Assur. Co. of London*, 26 S. D. 346, 128 N. W. 125. But acceptance may be implied under proper circumstances. *Todd v. German American Ins. Co.*, 2 Ga. App. 789, 59 S. E. 94.

458-461. (j) Sufficiency and effect of acceptance

458 (j). The general effect of an acceptance of the policy is to complete the contract and to render it binding on the parties (*Fidelity & Casualty Co. v. Fresno Flume & Irrigation Co.*, 161 Cal. 466, 119 Pac. 646, 37 L. R. A. [N. S.] 322). So, where a renewal policy was issued and mailed to a corporation in the name by which it was originally incorporated after its name had been changed, the acceptance of the policy constituted a binding contract between the parties (*Peever Mercantile Co. v. State Mut. Fire Ass'n*, 23 S. D. 1, 119 N. W. 1008, 19 Ann. Cas. 1236). The insured, accepting the policy, is presumed to know the recitals therein and is charged with notice of its terms.

The rule is supported by *Northwestern Nat. Life Ins. Co. v. Gray*, 161 Fed. 488, 88 C. C. A. 430; *Wyss-Thalman v. Maryland Casualty Co. of Baltimore* (C. C.) 193 Fed. 55, writ of error dismissed 193 Fed. 53, 113 C. C. A. 383; *Madsen v. Maryland Casualty Co. of Baltimore*, 168 Cal. 204, 142 Pac. 51; *Porter v. General Acc. Fire & Life Assur. Corp.*, 157 Pac. 825, 30 Cal. App. 198; *In re Millers' & Manufacturers' Ins. Co.*, 106 N. W. 485, 97 Minn. 98, 4 L. R. A. (N. S.) 231, 7 Ann. Cas. 1144; *Christensen v. New York Life Ins. Co.*, 160 Mo. App. 486, 141 S. W. 6; *Gagne v. Massachusetts Bonding & Ins. Co.* (N. H.) 101 Atl. 212; *Merchants' & Bankers' Fire Underwriters v. Brooks* (Tex. Civ. App.) 188 S. W. 243; *Crosby v. Vermont Accident Ins. Co.*, 84 Vt. 510, 80 Atl. 817.

The rule will apply, in the absence of misrepresentation by the company, though the insured could not read English and did not take pains to ascertain what its provisions were (*Lauze v. New York Life Ins. Co.*, 74 N. H. 334, 68 Atl. 31). It has, however, been held in Kansas (*German American Ins. Co. v. Darrin*, 80 Kan. 578, 103 Pac. 87), that an insurance company, accepting an application on a blank furnished by it, providing that it shall be the basis of the contract, must write the policy in accordance there-

with, and the insured may rely on the presumption that the policy he receives is in accordance with the application and is not obliged to read it to see that it conforms thereto.

459 (j). To be effective and binding on the insurer the acceptance of the policy must be before loss.

Waterloo Lumber Co. v. Des Moines Ins. Co., 158 Iowa, 563, 138 N. W. 504, 51 L. R. A. (N. S.) 539; New v. Germania Ins. Co. (Ind. App.) 82 N. E. 1005. And see Frecking v. Germania Ins. Co. (Ind. App.) 81 N. E. 217.

Under the provisions of the laws of a mutual benefit association requiring acceptance of a benefit certificate a formal written acceptance is not necessary.

Reference may be made to Wood v. Brotherhood of American Yeomen, 140 Iowa, 98, 117 N. W. 1123, reversing on rehearing 113 N. W. 825; Sovereign Camp Woodmen of the World v. Brown (Tex. Civ. App.) 88 S. W. 372.

Where applications for membership in a fraternal insurance order are forwarded to the home office, and, if in proper form and the applicant is found duly initiated and the fee for the benefit certificate paid, he is accepted, a benefit certificate being issued, the contract of insurance is effective when formally accepted by the insured; the place of the contract being the place of the insured's acceptance (Supreme Colony United Order of Pilgrim Fathers v. Towne, 89 Atl. 264, 87 Conn. 644, Ann. Cas. 1916B, 181).

And generally formal acceptance is not necessary but may be implied from acts and conduct (Todd v. German-American Ins. Co., 2 Ga. App. 789, 59 S. E. 94). Thus an acceptance of the policy will be implied from a retention thereof for an unreasonable time without objection.

Tapia v. Baggett, 167 Ala. 381, 52 South. 834; American Ins. Co. v. Dillahunt, 89 Ark. 416, 117 S. W. 245; Helbig v. Citizens' Ins. Co., 234 Ill. 251, 84 N. E. 897, affirming 138 Ill. App. 115; Wood v. Brotherhood of American Yeomen, 140 Iowa, 98, 117 N. W. 1023, reversing on rehearing, 113 N. W. 825; Mowles v. Boston Ins. Co., 226 Mass. 426, 115 N. E. 666; Finley v. Western Empire Ins. Co., 125 Pac. 1012, 69 Wash. 673.

Thus, where fire policies were mailed from another state to insured in Indiana, with a request that they be returned by a certain date if found to be unsatisfactory, insured's retention of them beyond that time, or mailing an acceptance, constituted an acceptance of the terms and completed the contracts (Swing v. Marion Pulp

Co., 47 Ind. App. 199, 93 N. E. 1004). And in *Rommel v. Griffin*, 81 Ark. 269, 99 S. W. 70, the retention of the policy without objection for one month was held to amount to an acceptance. An insured cannot, after receiving a life policy, delay acceptance for nearly six months, and then, by writing "Accepted" on the face of the policy, place it in effect, thus delaying time for payment of subsequent premiums (*Lyke v. American Nat. Assur. Co.* [Mo. App.] 187 S. W. 265).

In an action for the first premium on an insurance policy, where the defendant contended that he had not accepted the policy, a receipt given on March 28th cannot be deemed an "acceptance" of a corrected policy not delivered until March 29th. *Priddy v. Baum*, 140 N. Y. Supp. 481, 79 Misc. Rep. 607.

460 (j). Though acceptance may be presumed from possession (*Helbig v. Citizens' Ins. Co.*, 234 Ill. 251, 84 N. E. 897, affirming 138 Ill. App. 115), the presumption may be rebutted (*Helbig v. Citizens' Ins. Co.*, 120 Ill. App. 58).

The admissibility of evidence to show acceptance or non-acceptance is considered in *New v. Germania Fire Ins. Co.*, 171 Ind. 33, 85 N. E. 703, 131 Am. St. Rep. 245; *Cauthen v. Hartford Life Ins. Co.*, 61 S. E. 428, 80 S. C. 284.

The sufficiency of the evidence to show acceptance or non-acceptance is considered in *Sovereign Camp Woodmen of the World v. Hall*, 104 Ark. 538, 148 S. W. 526, 41 L. R. A. (N. S.) 517; *Miller v. Assureds' Nat. Mut. Fire Ins. Co.*, 164 Ill. App. 237; *Wood v. Brotherhood of American Yeomen (Iowa)* 113 N. W. 525; *Ætna Life Ins. Co. v. Hocker*, 89 S. W. 26, 39 Tex. Civ. App. 330.

461 (j). While the effect of the acceptance of the policy is a question of law, whether the policy has been accepted is a question of fact for the jury (*Manson v. Metropolitan Surety Co.*, 112 N. Y. Supp. 886, 128 App. Div. 577, judgment affirmed 93 N. E. 1124, 199 N. Y. 590).

8. COMPLETION OF CONTRACT—PAYMENT OF FIRST PREMIUM

461-465. (a) Necessity of payment of premium to bind company

461 (a). Though the obligation of the insurer is in a general sense dependent on the payment of premiums by the insured (*Hartford Fire Ins. Co. v. Whitman*, 75 Ohio St. 312, 79 N. E. 459, 9 Ann. Cas. 218), it is the general rule that actual payment of the

first premium is not, in the absence of a stipulation to that effect in the application or policy, a condition precedent to the liability of the insurer.

The principle is asserted in *New York Life Ins. Co. v. Greenlee*, 42 Ind. App. 82, 84 N. E. 1101; *Hoover v. Bankers' Life Ass'n*, 155 Iowa, 322, 136 N. W. 117; *Green v. Star Fire Ins. Co.*, 190 Mass. 586, 77 N. E. 649; *Metropolitan Life Ins. Co. v. Thompson* (Ga. App.) 93 S. E. 299.

So it has been held that in the absence of a stipulation requiring prepayment a policy delivered on the insured's promise to pay the premium in installments is valid (*Green v. Star Fire Ins. Co.*, 77 N. E. 649, 190 Mass. 586).

463 (a). Prepayment of the premium is not essential to the validity of a contract to issue a policy, in the absence of a demand for payment as a condition precedent.

Perry v. Security Life & Annuity Co., 150 N. C. 143, 63 S. E. 679; *Interstate Fire Ins. Co. v. McFall*, 114 Va. 207, 76 S. E. 293.

The same rule applies to a preliminary agreement to renew a policy.

Brown v. Home Ins. Co., 82 Kan. 442, 108 Pac. 824; *German Ins. Co. v. Goodfriend* (Ky.) 97 S. W. 1098; *Struzewski v. Farmers' Fire Ins. Co.* (Sup.) 166 N. Y. Supp. 362; *Orient Ins. Co. v. Wingfield*, 49 Tex. Civ. App. 202, 108 S. W. 788.

The fact that an accident insurance company delivered a renewal premium receipt to insured, purporting to renew insurance for another year, did not extend insurance without payment of premium, etc. (*Pacific Mut. Life Ins. Co. of California v. Vogel*, 232 Fed. 337, 146 C. C. A. 385).

465-467. (b) Same—Conditions requiring prepayment of premium

465 (b). A stipulation that the policy shall not become binding until the first premium is paid is not against public policy, but is valid and enforceable (*Perry v. Security Life & Annuity Co.*, 150 N. C. 143, 63 S. E. 679). Hence, if such a stipulation is contained in either the application or the policy, the contract does not take effect until the first premium is paid.

Reference may be made to *Brown v. Mutual Benefit Life Ins. Co.*, 131 Ga. 38, 61 S. E. 1123; *Perry v. Security Life & Annuity Co.*, 150 N. C. 143, 63 S. E. 679; *State Life Ins. Co. v. Harvey*, 73 N.

E. 1058, 72 Ohio St. 174; *Cranston v. West Coast Life Ins. Co.*, 63 Or. 427, 128 Pac. 427; *Bowen v. Mutual Life Ins. Co.*, 104 N. W. 1040, 20 S. D. 103.

So, where a policy provided that payment of full amount due thereunder should be a condition precedent to action against insurer, no obligation was assumed by insurer until payment of premium (*Boston Forwarding & Transfer Co. v. Contractors' Mut. Liability Ins. Co.*, 226 Mass. 372, 115 N. E. 494).

468-471. (e) Same—Payment before loss or during lifetime or good health of the insured

469 (e). The application for a life policy or the policy may contain a stipulation that the contract shall not take effect until the first premium has been actually paid during the good health of the applicant. In such cases actual payment of the premium while insured is in good health is a condition precedent to the liability of the insurer, unless waived.

The rule is stated in *Few v. Supreme Lodge K. P.*, 136 Ga. 181, 71 S. E. 130; *Metropolitan Life Ins. Co. v. Thompson* (Ga. App.) 93 S. E. 299; *Rathbun v. New York Life Ins. Co.*, 30 Idaho, 34, 165 Pac. 997; *Barker v. Metropolitan Life Ins. Co.*, 74 N. E. 945, 158 Mass. 542; *Perry v. Security Life & Annuity Co.*, 150 N. C. 143, 63 S. E. 679; *Lathrop v. Modern Woodmen of America*, 56 Or. 440, 109 Pac. 81, denying rehearing, 56 Or. 440, 106 Pac. 328; *Gordon v. Prudential Ins. Co.*, 231 Pa. 404, 80 Atl. 882; *Mohr v. Prudential Ins. Co.*, 32 R. I. 177, 78 Atl. 554; *Harriman v. New York Life Ins. Co.*, 86 Pac. 656, 43 Wash. 398.

Similarly, where the policy contained such a stipulation and the agent of the insurance company agreed to accept the applicant's note for the first premium, the execution and delivery of the note or the payment of the first premium during the good health of the applicant was a condition precedent to the liability of the insurance company (*Clark v. Mutual Life Ins. Co. of New York*, 59 S. E. 283, 129 Ga. 571). But, where there was a distinct agreement that the insured should have 60 days' time in which to pay the first premium, the policy was in force, though he was fatally ill when it was received by insurer's general agents (*Connecticut General Life Ins. Co. v. Mullen*, 197 Fed. 299, 118 C. C. A. 345, 43 L. R. A. [N. S.] 725). So, too, where the officers of the local camp of a mutual benefit association visited an applicant for membership while he was ill, obligated him, collected the first assessment and dues, and

delivered the certificate, the requirement as to payment while in good health was waived (*Sovereign Camp Woodmen of the World v. Dismukes* [Miss.] 38 South. 351).

470 (c). Where the premium is to be paid during the lifetime of the insured or while he is in good health, the premium must in any event be paid before the insured's death.

Reference may be made to *Sovereign Camp Woodmen of the World v. Hall*, 104 Ark. 538, 148 S. W. 528, 41 L. R. A. (N. S.) 517; *Clark v. Mutual Life Ins. Co. of New York*, 59 S. E. 283, 129 Ga. 571; *Neff v. Metropolitan Life Ins. Co.*, 39 Ind. App. 250, 73 N. E. 1041.

Where insured, when examined for insurance, appeared in perfect health, but was taken with appendicitis before policy was delivered, and note given for premium was not paid before death, despite delivery by the agent, the policy did not take effect. *Williams v. Empire Life Ins. Co.*, 146 Ga. 246, 91 S. E. 44.

In *Lilja v. Standard Accident Ins. Co.*, 171 Mich. 378, 137 N. W. 266, the insured gave the insurer an order for his wages in payment of the premium, but soon thereafter changed his employment. The policy provided that any change of employment before payment of the premium would terminate the contract. The premium was not in fact paid at the time of insured's death. It was held that there could be no recovery on the policy. In *Bowen v. Mutual Life Ins. Co.*, 20 S. D. 103, 104 N. W. 1040, a binding receipt had been given to the insured, reciting a part payment of the premium and stipulating that, if the policy was issued, the receipt would be accepted in part payment, provided the balance of the premium was paid on delivery of the policy. The application stipulated that the insurance should not take effect until the first premium was paid during the good health of the applicant. It was held that there could be no recovery on the policy the insured having died before the payment of the premium was made, though the application recited that the receipt made the insurance in force from the date of the application on the issuance of the policy.

A stipulation in a policy that it shall be complete only by the payment of the first premium during good health of insured, considered in connection with a provision that the policy shall be incontestable except for suicide committed within one year, refers only to the health of insured during the period intervening between the acceptance of the risk and agreement to issue the policy and the time when the first premium is paid and the policy is delivered

(Webster v. Columbian Nat. Life Ins. Co., 116 N. Y. Supp. 404, 131 App. Div. 837, affirmed in 196 N. Y. 523, 89 N. E. 1114).

471-475. (f) What constitutes payment

471 (f). A premium may be paid by a third person for the insured (Metropolitan Life Ins. Co. v. Lindsay's Adm'r, 124 Ky. 707, 100 S. W. 295). Hence a life policy is not void because the premiums have been paid by one not the insured or beneficiary, or by one having no insurable interest in the life of insured, whether or not the person making the payments made them in the belief that he was named as beneficiary, or that he could collect on it (Monast v. Manhattan Life Ins. Co., 79 Atl. 932, 32 R. I. 557). Such payment may be made by the note or obligation of a third person, the sole question being whether it was accepted as actual payment (Home Fire Ins. Co. v. Stancell, 94 Ark. 578, 127 S. W. 966).

472 (f). In accord with the rule that a premium may be paid by a third person is the case of Metropolitan Life Ins. Co. v. Lindsay's Adm'r, 124 Ky. 707, 100 S. W. 295. In this case a life policy issued to insurer's soliciting agent stipulated that the insurer assumed no obligation until the first premium had been paid. The superintendent of the insurer paid the first premium, and the agent was charged with it by having the same deducted from commissions due him as soliciting agent. The insurer received the premium and accepted it. It was held that the first premium was paid, within the stipulation of the policy.

An insured cannot, however, pay the premium by satisfying a private debt due him from the agent of the insurer. This principle is stated in Gazzam v. German Union Fire Ins. Co., 155 N. C. 330, 71 S. E. 434, Ann. Cas. 1912C, 362, but the facts of the case did not call for its application. According to the facts appearing in that case, a fire insurance company having become insolvent, its general agent contracted with another insurance company, through its agent, whereby the latter company agreed to reinsure the outstanding risks of the insolvent company. A holder of a policy issued by the insolvent company surrendered the policy and his right to the return premium thereon in consideration of receiving a new policy issued by the latter company. Without knowledge of the policy holder, it was agreed between the agents that the return premium should be applied to an indebtedness existing be-

tween them. Neither of the agents was the agent of insured. It was held that an action on the new policy could not be defeated on the ground that the premium therefor had not been received by the latter company.

474 (f). Where the collecting officer of a mutual benefit association kept an office known to the members, where he transacted the business of the order, a tender of dues and assessments and demand of a certificate, made on the collector on a public street, after business hours and away from his office, at a time and place where he could not comply with the requirements of the order or furnish the certificate properly signed, was insufficient to fix the rights, as a member, of the person making the tender, or the liability of the association (*Sterling v. Head Camp*, Pacific Jurisdiction, *Woodmen of the World*, 80 Pac. 1110, 28 Utah, 526, denying rehearing of 28 Utah, 505, 80 Pac. 375).

475-476. (g) Effect of part payment—Time of payment

475 (g). If the agent states the amount of the first premium as a sum less than the true amount, a payment of such less amount is nevertheless sufficient to bind the insurer in the absence of fraud (*New York Life Ins. Co. v. Pike*, 51 Colo. 238, 117 Pac. 899). In *Bowen v. Mutual Life Ins. Co.*, 20 S. D. 103, 104 N. W. 1040, the application for a life policy stipulated that the policy should not take effect until the first premium was paid and the policy issued. The applicant made a partial payment of the first premium and received a receipt from the agent, which recited that, if a policy should be issued, the receipt would be accepted in payment of the first premium if the balance was paid on the delivery of the policy, and that no other person than the secretary or president of the insurer could make contracts or waive forfeitures. The policy issued provided that the annual premium should be paid in advance on the delivery of the policy. It was held that the insurer did not bind itself to pay the policy unless the first premium was paid in full at the time of the delivery of the policy.

476 (g). An insured is not bound to pay the premium until the policy is issued and ready for delivery (*Posey County Fire Ass'n v. Hogan*, 37 Ind. App. 573, 77 N. E. 670). And even though a policy provides that it is not to take effect unless the first premium is paid, such premium is not past due because not paid on the day on which the policy bears date (*Kennedy v. Metropolitan Life Ins.*

Co., 40 South. 533, 116 La. 66). Where benefit certificate, the application therefor, and the by-laws made a part thereof required delivery of the certificate and payment of the first month's dues as a condition precedent to liability, dues paid May 2d upon delivery of certificate issued March 28th were the dues for May, notwithstanding provision that the first assessment should be for the first month following that in which the certificate was issued (*Kirk v. Sovereign Camp, Woodmen of the World*, 169 Mo. App. 449, 155 S. W. 39).

476-480. (h) Payment to agent or broker

477 (h). If a policy is delivered by the company to an agent for the purpose of its delivery and the collection of the premium thereon if such policy is delivered to the insured, the fact that such agent fails to turn over the premium so collected to the company will not prevent its going into effect as against the company (*Frankfort Marine Accident & Plate Glass Ins. Co. v. Lynch*, 156 Ill. App. 485). But this rule must, of course, yield to circumstances. Thus in *State Life Ins. Co. v. Harvey*, 72 Ohio St. 174, 73 N. E. 1056, the agent of a life insurance company procured a policy on his own life containing a provision that it should not be in force until the first premium was paid to the company or an authorized agent. The agent being unable to pay, his son-in-law furnished to the agent as the agent for the company the amount due for said premium without the knowledge of the insurance company, and no part of the money received was ever paid over to the insurance company by the agent. It was held that the payment to and receipt by the agent of the money from his son-in-law was not a payment of the premium to the insurance company or its authorized agent, and did not bind the company or put the policy in force.

478 (h). Of course, payment must be made to a person authorized to receive it. In *Kilborn v. Prudential Ins. Co.*, 99 Minn. 176, 108 N. W. 861, it was held generally that the agent of a foreign insurance company, authorized to solicit insurance in the state, had authority, under Gen. Laws 1895, p. 437, c. 175, § 88, providing that every insurance agent negotiating a contract for the insurance company shall be held to be the company's agent for the purpose of collecting or securing premiums, to collect the first premium. Policies may provide that they shall take effect only on payment of the premium to the person producing the proper receipts therefor, in

which case payment to an agent who did not hold the receipts would not be a sufficient payment (*Lauze v. New York Life Ins. Co.*, 74 N. H. 334, 68 Atl. 31).

480-484. (i) Giving credit for premium

480 (i). Actual payment of the premium is not necessary. The insurer may give credit for the premium, and if it does so the contract is binding without actual payment (*Marysville Mercantile Co. v. Home Fire Ins. Co.*, 21 Idaho, 377, 121 Pac. 1026).

482 (i). It is a general rule that, if the policy is delivered without payment of the premium, the insurer will be presumed to have extended credit therefor.

The rule is supported by *Raulet v. Northwestern Nat. Ins. Co.*, 157 Cal. 213, 107 Pac. 292; *Hoover v. Bankers' Life Ass'n*, 155 Iowa, 322, 136 N. W. 117; *Washburn v. United States Casualty Co.*, 108 Me. 429, 81 Atl. 575; *Essington Enamel Co. v. Granite State Fire Ins. Co.*, 45 Pa. Super. Ct. 550; *Cauthen v. Hartford Life Ins. Co.*, 61 S. E. 428, 80 S. C. 264.

Credit for the first premium of a policy of insurance if not expressly given may be shown by circumstances characterizing the transaction and general course of business as conducted by insurance company through its agent (*Hartwig v. Aetna Life Ins. Co. of Hartford, Conn.*, 158 N. W. 280, 164 Wis. 20). A general agent of an insurance company, even though in violation of the rules and regulations of his principal, may give credit for premiums (*State Mut. Fire Ins. Co. v. Taylor* [Tex. Civ. App.] 157 S. W. 950).

484-486. (j) Payment by agent or broker

484 (j). If an insurance agent advances the premium to the company taking insured's note for the amount, the policy is binding on the insurer (*Rosenborg v. Johnson*, 45 Colo. 53, 99 Pac. 315). So, too, where insurer debits the premium to the agent, and looks to him ultimately for payment, then, as between insured and insurer, the premium is paid (*Life Ins. Co. of Virginia v. Hairston*, 62 S. E. 1057, 108 Va. 832, 128 Am. St. Rep. 989). Thus where, as soon as a life insurance policy was issued, the company had charged up its agent with the part of the premium due it, the debt to the company was transferred to the agent, and it could not claim that because of plaintiff's alleged failure to pay the premium within the required time the policy became void (*Perea v. State Life Ins. Co.*,

15 N. M. 399, 110 Pac. 559). So, where an insured has a running account with an insurance agency with whom he settles his insurance premium accounts from time to time as called upon to do so, a policy of insurance taken out by him through the agency is not invalidated because the premiums were not paid when the policy was taken out, but insured is entitled to pay upon demand only (*Pelican Assur. Co. of New York v. Schildknecht*, 108 S. W. 312, 128 Ky. 351, 32 Ky. Law Rep. 1257).

On the other hand, the payment of a life insurance premium by the agent of the insurer, without any request on the part of the insured or promise of payment, does not bind the insurer on the policy (*New York Life Ins. Co. v. Manning*, 156 App. Div. 818, 124 N. Y. Supp. 775). So it has been held that, where a life policy provided it should not go into effect until payment of the first premium, payment of premium by agent did not render it effective (*Lyke v. American Nat. Assur. Co.* [Mo. App.] 187 S. W. 265). And in *Pioneer Life Ins. Co. v. Cox*, 112 Ark. 582, 166 S. W. 951, it was said that, notwithstanding a custom of the company to charge its part of the first premium to the soliciting agent and to allow him to make his own arrangement for its collection, if the insured did not pay the premium at all, and it was paid to the company by the agent, the company could forfeit the policy under the clause giving such right of forfeiture, where the premiums or premium notes were not paid when due.

486-489. (k) Payment by note

486 (k). It is a general rule that the acceptance by an insurer of the note of the insured for the first premium will make the contract of insurance binding, though the policy requires the premium to be paid before the contract shall become effective.

The rule is supported by *Mutual Life Ins. Co. v. Abbey*, 76 Ark. 328, 88 S. W. 950; *New York Life Ins. Co. v. Pike*, 51 Colo. 238, 117 Pac. 899; *Hipp v. Fidelity Mut. Life Ins. Co.*, 128 Ga. 491, 57 S. E. 892, 12 L. R. A. (N. S.) 319; *Williams v. Empire Mut. Annuity & Life Ins. Co.*, 8 Ga. App. 303, 68 S. E. 1082; *Brown v. Bowman*, 10 Ga. App. 707, 73 S. E. 1078; *Devine v. Federal Life Ins. Co.*, 157 Ill. App. 254, affirmed in 250 Ill. 203, 95 N. E. 174; *McGee v. Felter*, 135 N. Y. Supp. 267, 75 Misc. Rep. 349; *Francis v. Mutual Life Ins. Co.*, 55 Or. 280, 106 Pac. 323. See, also, *Unterharnscheidt v. Missouri State Life Ins. Co.*, 160 Iowa, 223, 138 N. W. 459, 45 L. R. A. (N. S.) 743, where it was held that giving a note in payment of first premium on insurance pol-

icy is not insufficient as payment merely because made to the maker's order and not indorsed, notwithstanding Code Supp. 1907, § 3060a184.

But where a policy provided that it should not be operative until the actual payment of the initial premium and delivery of the policy during the lifetime and good health of the assured, and that no agent had authority to grant credit or extend the time for paying any premium, or to bind the company by making any promise, a note by the assured, given to the agent of the insurer for the initial premium, did not constitute payment, in the absence of authority from the insurer, or subsequent waiver or ratification on its part (*Batson v. Fidelity Mut. Life Ins. Co.*, 155 Ala. 265, 46 South. 578, 130 Am. St. Rep. 21).

487 (k). An insurance agent, authorized to make contracts of insurance, issue policies and deliver them, and collect premiums, has power to accept notes for premiums (*Home Fire Ins. Co. v. Stancell*, 94 Ark. 578, 127 S. W. 966). So, too, in the case of life insurance contracts, unless the applicant has knowledge of express limitations on the authority of the agent, the acceptance by the agent of a note in payment of the first premium is binding on the company (*Kilborn v. Prudential Ins. Co.*, 108 N. W. 861, 99 Minn. 176).

Generally a soliciting agent employed by a general agent of an insurance company requiring all premiums to be paid in cash, cannot bind the company by accepting notes in lieu of cash for a premium (*Mutual Life Ins. Co. v. Abbey*, 76 Ark. 328, 88 S. W. 950). But, where a policy is delivered, it becomes effective notwithstanding the first premium has not been actually paid if it is given into the possession of the insured pursuant to a plan sanctioned by the company by which the insured gave his note for the first premium to the soliciting agent whose property such note became (*Devine v. Federal Life Ins. Co.*, 157 Ill. App. 254, judgment affirmed 95 N. E. 174, 250 Ill. 203). So, too, it has been held in Minnesota (*Kilborn v. Prudential Ins. Co.*, 99 Minn. 176, 108 N. W. 861), that an agent of a foreign life insurance company authorized by Gen. Laws 1895, p. 392, c. 175, to solicit insurance and collect the first premium, has apparent authority to take a note for the first premium. Similarly where the practice of the agent has been to give credit or take notes for premiums, this practice being approved by the insurer, who held the agent respon-

sible for the premium, the giving of the note was a sufficient payment of the premium to bind the insurer on the contract.

Reference may be made to *Kimbrow v. New York Life Ins. Co.*, 134 Iowa, 84, 108 N. W. 1025, 12 L. R. A. (N. S.) 421; *Life Ins. Co. of Virginia v. Hairston*, 108 Va. 832, 62 S. E. 1057, 128 Am. St. Rep. 989. And see *Clarke v. Home Fund Life Ins. Co.*, 79 S. C. 494, 61 S. E. 80.

In *Franklin Life Ins. Co. v. McAfee* (Ky.) 90 S. W. 216, it was held that a life policy taken out by an agent of the insured, who by reason of such agency was entitled to a commission of 65 per cent. on the first annual premium, is not put in force for 6 months by reason of the indorsement of the 65 per cent. on his 30-day note for the first annual premium, under the provision of the policy that, though the contract of insurance is based on the receipt of premium annually in advance, the premiums may be paid in semiannual or quarterly installments, in advance; such indorsement not being a quarterly or semiannual payment, in the meaning of the policy.

488 (k). If a note given to the agent for the first premium is discounted by the agent and accounted for to the company as cash in the agent's hands, there is a payment of the premium, binding the company on the contract (*Manhattan Life Ins. Co. v. Hereford*, 172 Ala. 434, 55 So. 497). So, too, where a general agent of a life insurance company, authorized to collect premiums and to retain his commissions therefrom, credited an applicant for insurance with one-half the first premium, to which he was entitled as a commission, and took the applicant's note for the remainder, which he discounted at a bank before the applicant's death, the entire amount of the premium being credited to the company by the agent as cash in his hands, such transaction constituted a payment of the premium binding on the company (*Robinson v. Union Cent. Life Ins. Co.* [C. C.] 144 Fed. 1005).

489 (k). In the absence of an express restriction on his authority, an agent of a life insurance company has power to make a verbal agreement with an applicant for a policy that a premium note signed by the applicant shall be surrendered in case the applicant declines to accept the policy (*Mutual Reserve Life Ins. Co. v. Seidel*, 52 Tex. Civ. App. 278, 113 S. W. 945).

489-492. (l) Same—Effect of failure to pay note at maturity

489 (l). If the policy and notes given for the first premium provide, if the notes be not paid when due, the policy shall be void,

the failure to pay the note at maturity terminates the contract (*Hipp v. Fidelity Mut. Life Ins. Co.*, 128 Ga. 491, 57 S. E. 892, 12 L. R. A. [N. S.] 319). In this case it was also held that the insured had the whole day of maturity in which to make payment, and his right to pay would not terminate with the close of banking hours, though the note was payable at a bank. It was further held, however, that the attempt of one acting as a volunteer merely, and not as agent of the insured, to pay the note, which was unsuccessful, because the bank was closed, as was also the office of the local agent, did excuse the failure to pay. Neither would the illness of the insured, rendering him unable to attend to business, excuse nonpayment. So it has been held that a note given for the premium due at commencement of a 10-year endowment policy must be paid when due to render policy effective, or the time of payment must be properly extended (*Selman v. Manhattan Life Ins. Co.* [Ga. App.] 93 S. E. 60).

490 (1). There are, however, exceptions to the rule that where the policy contains such a condition the failure to pay a note at maturity terminates the insurance. Thus in *Citizens' Life Ins. Co. v. Coleman*, 148 Ky. 750, 147 S. W. 414, it was said that where the initial insurance contract was a receipt for the first premium note, the condition in the policy, which was not delivered, providing for forfeiture on nonpayment of the note, would not apply. So in *Chasse v. Bankers' Reserve Fund Life Ins. Co.*, 27 S. D. 70, 129 N. W. 568, it was held that under the provisions of Civ. Code S. D. § 1849, declaring that an acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid, the policy being a conclusive receipt as to the first year's premium, a stipulation in a policy that it shall become null and void in case of a nonpayment of any note given in connection with the policy can only apply to any note given for a premium subsequent to the first.

492 (1). In the absence of any condition in the policy or notes declaring that a failure to pay a note given for first premium at maturity shall terminate the contract, the mere failure to pay the note will not render the insurance void.

Reference may be made to *Mutual Life Ins. Co. v. Abbey*, 88 S. W. 960, 70 Ark. 328, and *Clarke v. Home Fund Life Ins. Co.*, 61 S. E. 80, 79 S. C. 494.

492-493. (m) Effect of payment

492 (m). The effect of payment of the first premium is generally to complete the contract, and render it binding as between the insurer and the insured.

Arnold v. Empire Mut. Annuity & Life Ins. Co., 60 S. E. 470, 3 Ga. App. 685; *Metropolitan Life Ins. Co. v. Lindsay's Adm'r*, 100 S. W. 295, 30 Ky. Law Rep. 930.

But, if the receipt of the first year's premium is conditional on acceptance of the application, there is, of course, no contract, unless the application is approved (*McNicol v. New York Life Ins. Co.*, 149 Fed. 141, 79 C. C. A. 11). And the same is true where the insured gave his note for the premium, with the understanding that it should be returned if the applicant should not accept the policy issued to him, even though the agent wrongfully negotiated the note (*Mutual Reserve Life Ins. Co. v. Seidel*, 52 Tex. Civ. App. 278, 113 S. W. 945).

493-494. (n) Effect of receipt for premium

493 (n). The issuance of a properly signed and countersigned receipt for the first premium is not conclusive of the fact that the premium was paid, though it is sufficient, in the absence of countervailing evidence, to warrant a finding of such fact (*Industrial Mutual Indemnity Co. v. Perkins*, 81 Ark. 87, 98 S. W. 709). In *Bowen v. Mutual Life Ins. Co.*, 20 S. D. 103, 104 N. W. 1040, the facts were as follows: The application for a life policy stated that the policy should not take effect until the first premium was paid during the good health of the applicant, and recited that the applicant had received from the soliciting agent a receipt making the insurance in force from the date of the application on the issuance of a policy thereon. On the same day the agent delivered to the applicant a receipt reciting a partial payment of the first premium and stipulating that, if a policy should be issued, the receipt would be accepted in part payment of the premium, provided the balance would be paid on the delivery of the policy. It was held that the applicant was not led, by the statement in the application that a binding receipt had been issued, to believe that a policy would be in force from the date of the application, it being presumed, in the absence of fraud, that the applicant had read the application and receipt; and hence the beneficiary could not recover on the policy, on the death of the insured before payment of the first premium.

494-496. (c) Pleading and practice

495 (c). The possession of the policy by the insured raises a presumption that the first premium has been paid.

Globe Mut. Life Ins. Ass'n v. Meyer, 118 Ill. App. 155; Helbig v. Citizens' Ins. Co., 234 Ill. 251, 84 N. E. 897, affirming 138 Ill. App. 115.

Though, in a general sense, the burden is on the plaintiff to show that the first premium has been paid (*Amos-Richia v. Northwestern Mut. Life Ins. Co.*, 143 Mich. 684, 107 N. W. 707), there is a difference of opinion whether the plaintiff has the burden of showing that the payment was made while insured was in good health; the application or policy containing such a condition. In New York (*McClelland v. Mutual Life Ins. Co.*, 151 App. Div. 264, 135 N. Y. Supp. 735) it has been held that whether the insured was in poor health at the time of payment need not be negated by the plaintiff. On the other hand, in Massachusetts (*Lee v. Prudential Life Ins. Co.*, 203 Mass. 299, 89 N. E. 529, 17 Ann. Cas. 236) it has been said that where an application for life insurance, which was a part of the policy, provided that the policy should not take effect until issued and delivered, and the first premium paid in full, while insured was in good health, the burden was on plaintiff to show, not only that the policy was delivered, but that the first premium was paid, while insured was in good health.

The admissibility of evidence to show payment of the first premium is considered in *National Life & Accident Ins. Co. v. Lokey*, 166 Ala. 174, 52 South. 45; *Cauthen v. Hartford Life Ins. Co.*, 61 S. E. 428, 80 S. C. 264; *Metropolitan Life Ins. Co. v. Williamson*, 174 Fed. 116, 98 C. C. A. 90.

The admissibility of evidence to show payment while in good health is considered in *United Order of the Golden Cross v. Hooser*, 160 Ala. 334, 49 South. 354; *Lee v. Prudential Life Ins. Co.*, 92 N. E. 709, 206 Mass. 440; *Life Ins. Co. of Virginia v. Hairston*, 62 S. E. 1057, 108 Va. 832, 128 Am. St. Rep. 989.

Where the question of the condition of insured's health at the time of payment of the first premium is in issue, that payment was made while he was in good health must be shown by a preponderance of evidence (*Mohr v. Prudential Ins. Co.*, 32 R. I. 177, 78 Atl. 554).

The sufficiency of the evidence to show payment of the first premium is considered in *Industrial Mut. Indemnity Co. v. Perkins*, 81 Ark. 87, 98 S. W. 709; *Industrial Mut. Indemnity Co. v. Perkins*,

87 Ark. 70, 112 S. W. 176; *Mutual Life Ins. Co. v. Reid*, 21 Colo. App. 143, 121 Pac. 132 (payment by note); *Unterharnscheidt v. Missouri State Life Ins. Co.*, 160 Iowa, 223, 138 N. W. 459, 45 L. R. A. (N. S.) 743; *Amos-Richla v. Northwestern Mut. Life Ins. Co.*, 107 N. W. 707, 143 Mich. 684; *Shoemaker v. Commercial Union Assur. Co.*, 106 N. W. 316, 75 Neb. 587; *Cauthen v. Hartford Life Ins. Co.*, 61 S. E. 428, 80 S. C. 264.

Sufficiency of evidence to show payment while in good health is considered in *Lee v. Prudential Life Ins. Co.*, 203 Mass. 299, 89 N. E. 529, 17 Ann. Cas. 236. In *State Life Insurance Co. v. Murray*, 159 Fed. 408, 86 C. C. A. 344, affirming (C. C.) 151 Fed. 539, the evidence was held to warrant a finding that the insurance company was estopped to deny that its soliciting agent, to whom payment of premium had been made, had authority to receive the same on the company's behalf.

The sufficiency of the evidence to show that credit had been extended for the first premium is considered in *Raulet v. Northwestern Nat. Ins. Co.*, 157 Cal. 213, 107 Pac. 292; *Cornell v. Travelers' Ins. Co. of Hartford, Conn.*, 120 App. Div. 459, 104 N. Y. Supp. 999, affirmed in 85 N. E. 1107, 192 N. Y. 587; *Cauthen v. Hartford Life Ins. Co.*, 61 S. E. 428, 80 S. C. 264.

496 (c). Whether the first premium has been paid is a question for the jury.

Unterharnscheidt v. Missouri State Life Ins. Co., 160 Iowa, 223, 138 N. W. 459, 45 L. R. A. (N. S.) 743 (payment by note); *Manson v. Metropolitan Surety Co.*, 112 N. Y. Supp. 886, 128 App. Div. 577 (credit given).

So, too, is the question whether payment was made while insured was in good health.

Few v. Supreme Lodge K. P., 136 Ga. 181, 71 S. E. 130; *Melsenbach v. Supreme Tent, Knights of the Maccabees of the World*, 140 Mo. App. 76, 119 S. W. 514.

In an action on a life policy, issued by a company requiring cash payments of premiums, where the evidence on the issue whether the general agent of the company authorized to accept notes in lieu of cash for the first year's premium did so on the understanding that failure to pay the same at maturity should not work a forfeiture of the policy was conflicting, an instruction to the effect that plaintiff could recover only if the jury found that the general agent accepted the notes in lieu of cash payment, correctly submitted the question to the jury (*Mutual Life Ins. Co. v. Abbey*, 88 S. W. 950, 76 Ark. 328).

9. ESTOPPEL AND WAIVER AS TO PAYMENT OF FIRST PREMIUM

496-498. (a) Estoppel and waiver in general

496 (a). A condition in a contract of insurance requiring payment of the first premium as a condition precedent to the attaching of liability may be waived by the insurer or its authorized agent.

Illinois Life Ins. Co. v. Kennedy, 191 Ill. App. 29; *Supreme Lodge United Benevolent Ass'n v. Lawson*, 63 Tex. Civ. App. 273, 133 S. W. 907.

Consequently, where there is evidence of waiver of the requirement that the premium should be paid in cash, and of an extension of credit, it was proper to refuse to charge that the contract of insurance never took effect unless the premium was paid (*Cauthen v. Hartford Life Ins. Co.*, 61 S. E. 428, 80 S. C. 264).

498-500. (b) Powers of officers and agents to waive payment

498 (b). An agent authorized to issue and deliver policies and collect premiums, or one authorized to deliver policies and collect premiums, has power to waive prepayment of the premium, though called for by a condition in the policy.

The rule is supported by *New York Life Ins. Co. v. Greenlee*, 42 Ind. App. 82, 84 N. E. 1101; *Life Ins. Co. of Virginia v. Hairston*, 62 S. E. 1057, 108 Va. 832, 128 Am. St. Rep. 989; *Sun Ins. Office of London v. Mitchell*, 186 Ala. 420, 65 South. 143.

In *Supreme Lodge, United Benevolent Ass'n, v. Lawson*, 63 Tex. Civ. App. 273, 133 S. W. 907, it was held that where the by-laws of an insurance society provided that the duties of the secretary of a subordinate lodge should be to collect and receipt for all dues of the subordinate and supreme lodges, and keep a correct list of all members, remit all supreme lodge funds to the supreme secretary, promptly deliver all benefit certificates, and immediately on the death of any member to notify the supreme secretary, and, on receiving blank proofs, to have them properly filled, and to do and perform such other duties as usually devolve on secretaries of deliberative bodies, such secretary had power to waive the prepayment of premiums.

499 (b). Although a life insurance company may have given its agents printed instructions not to take notes for first premiums,

such rule or a like condition in a policy may be waived by the company (*Metropolitan Life Ins. Co. v. Williamson*, 174 Fed. 116, 98 C. C. A. 90).

500-501. (c) Same—Conditions limiting the powers of agents

500 (c). Where a policy of life insurance provides on its face that it shall not take effect until the first premium has been actually paid during the lifetime of the insured, and that no agent is authorized to make, alter, or discharge any contract in relation to the policy, or to waive any forfeiture thereof, such policy will not take effect before the payment of the first premium, although the agent who issued it stated to the father of the insured, who called to see him while his son was sick, that the premium might be paid at a later date (*Brown v. Mutual Benefit Life Ins. Co.*, 61 S. E. 1123, 131 Ga. 38). Similarly where the constitution and by-laws of a mutual benefit association provide that officers of subordinate lodges shall not have power to waive any of its regulations, a clerk of a local lodge cannot waive the regulation that no benefit certificate shall become effective unless one assessment has been paid (*Sovereign Camp, Woodmen of the World, v. Hall*, 104 Ark. 538, 148 S. W. 526, 41 L. R. A. [N. S.] 517).

501-504. (d) Waiver by custom and course of dealing

501 (d). In ascertaining whether payment of the premium was waived the course of dealing between the parties may be looked to (*Orient Ins. Co. v. Wingfield*, 49 Tex. Civ. App. 202, 108 S. W. 788). Consequently a parol agreement to renew an insurance policy at its expiration is valid though no premium was tendered on the day the renewal policy should have issued, where dealings between the parties for several years justified the belief of the insured that credit was to be extended for the premium and that he was to pay only on demand (*German Ins. Co. v. Goodfriend*, 97 S. W. 1098, 30 Ky. Law Rep. 218).

504-507. (e) Waiver implied from acts, conduct, or statements of insurer

505 (e). A condition requiring prepayment of the first premium is waived by extending credit to the insured or accepting his note for the amount thereof.

Pioneer Life Ins. Co. v. Cox, 112 Ark. 582, 166 S. W. 951; *Hipp v. Fidelity Mut. Life Ins. Co.*, 57 S. E. 892, 128 Ga. 491, 12 L. R.

A. (N. S.) 319; *Mulligan v. Metropolitan Life Ins. Co.*, 149 Ill. App. 516; *Hawthorne v. German Alliance Ins. Co.*, 181 Ill. App. 88; *New York Life Ins. Co. v. Greenlee*, 42 Ind. App. 82, 84 N. E. 1101; *Ellis v. Anderson*, 49 Pa. Super. Ct. 245; *Clarke v. Home Fund Life Ins. Co.*, 61 S. E. 80, 79 S. C. 494; *Supreme Lodge, United Benevolent Ass'n, v. Lawson*, 63 Tex. Civ. App. 273, 133 S. W. 907.

Where an insurance company retained the insured's premium note without telling him that it canceled the insurance for non-payment of the note, and received a new premium note, it thereby elected to prolong the life of the insurance contract (*Citizens' Life Ins. Co. v. Coleman*, 148 Ky. 750, 147 S. W. 414). And to the same effect is *Concordia Fire Ins. Co. v. Bowen*, 121 Ill. App. 35. But a condition in a life policy that it should not become operative till the initial premium is paid and the policy is delivered was not waived by any agreement to give time on the premium, if it did not appear that any one expected the policy would be delivered or become binding till settled for, by a note or otherwise (*Dennis v. Fidelity Mut. Life Ins. Co.*, 124 N. W. 575, 159 Mich. 594).

The payment of a small installment of the first premium on a life insurance policy, and an assurance by defendant that the policy was in force is sufficient (*Lasch v. New York Life Ins. Co.* [City Ct.] 153 N. Y. Supp. 898). So, too, an insurer, by requiring insured to commence the publishing of advertising out of which it was agreed the first premium should be deducted, will waive the condition that the policy should be ineffective until delivery and payment of the first premium (*Central Life Ins. Co. v. Roberts*, 165 Ky. 296, 176 S. W. 1139).

A waiver will also be implied where a sufficient tender of the premium is refused (*Supreme Lodge, United Benevolent Ass'n, v. Lawson*, 63 Tex. Civ. App. 273, 133 S. W. 907). But a contention that a sufficient tender of dues and assessments was excused, because of testimony of the lodge clerk that a good tender alone would not have authorized him to deliver the certificate in suit, and that he would not have delivered it until the applicant was obligated and the certificate signed by the camp commander, is untenable, where the tender was not the only condition precedent to give effect to the contract of insurance (*Sterling v. Head Camp, Pacific Jurisdiction, Woodmen of the World*, 80 P. 375, 28 Utah, 505, rehearing denied 80 P. 1110, 28 Utah, 526). In *Hardy v. Aetna Life Ins. Co.*, 154 N. C. 430, 70 S. E. 828, where the question was wheth-

er there had been such a delivery of the policy as would estop the insurer from raising an objection based on lack of insurable interest it was held that the failure of an insured to pay the first premium is not conclusive evidence on the question of delivery to the insured, so that, where the local agent of the defendant knew all the facts, and the information he had was given to the state agent of the defendant and to the defendant itself, and with this information the defendant sent the policies, and the forms for assignment, to the local agent, for the purpose of having the contract completed, and received premiums for four years, it waived a provision in the policy that it should not be in force until the first premium was paid.

On the other hand, in *Neff v. Metropolitan Life Ins. Co.*, 39 Ind. App. 250, 73 N. E. 1041, it was held that there was no waiver of payment of the first premium on the following facts: The applicant informed the soliciting agent that he would be unable to pay for the policy for some time after it was issued, and the agent stated that he would settle with the company and that the applicant could pay him later. The policy was issued, and sent, with directions to account for the premium, to the agent, who received it after the death of the applicant, retained it a few days, and returned it, the premium never having been paid by any one. The application provided that the policy should not be in force until actual payment of the premium during the lifetime and good health of the insured, and the policy declared that the contract was completely set forth in the policy and application, and that none of its terms could be varied except by agreement in writing by the company officers.

In *Cranston v. West Coast Life Ins. Co.*, 63 Or. 427, 128 Pac. 427, the local agent, T., who was not authorized to accept payment, took a note running to himself for the premium. The insurer charged the amount of the premium to B., the general agent. It was held that there was no waiver of payment of the first premium because, the insurer not having agreed to accept T. as its debtor or release insured, and the insured not having agreed to pay B., there was no novation. In *Few v. Supreme Lodge K. P.*, 136 Ga. 181, 71 S. E. 130, the benefit certificate provided that no officer or representative should have power to waive the provisions of the contract, and that the contract should not take effect until payment of the first assessment while the member was in good health. It was held that if his first payment was made, not at the inception of the contract, but subsequent to the date of the certificate when the

member was not in good health, its acceptance by a representative authorized to collect premiums with knowledge of the insured's ill health would not operate as a waiver, or estop the society from contending that it was not liable because the insured was not in good health when payment was made, though it was conceded that the rule would be otherwise if the delivery of the certificate and acceptance of the premium were contemporaneous.

507-509. (f) Waiver by delivery of policy

507 (f). A delivery of the policy without requiring prepayment of the premium waives such prepayment as a requisite to the taking effect of the contract, though the policy contains a stipulation making payment a condition precedent to the attaching of insurer's liability.

Mutual Reserve Life Ins. Co. v. Heidel, 161 Fed. 535, 88 C. C. A. 477; *National Mut. Fire Ins. Co. v. Sprague*, 92 Pac. 227, 40 Colo. 344; *Williams v. Empire Mut. Annuity & Life Ins. Co.*, 8 Ga. App. 303, 68 S. E. 1082; *Few v. Supreme Lodge K. P.*, 136 Ga. 181, 71 S. E. 130; *Globe Mut. Life Ins. Ass'n v. Meyer*, 118 Ill. App. 155; *People v. Commercial Life Ins. Co.*, 93 N. E. 90, 247 Ill. 92; *York v. Sun Ins. Office (Ind. App.)* 113 N. E. 1021; *Hoover v. Bankers' Life Ass'n*, 155 Iowa, 322, 136 N. W. 117; *McLean v. Tobin*, 109 N. Y. Supp. 926, 58 Misc. Rep. 528; *Equitable Trust Co. of New York v. Newman*, 127 N. Y. Supp. 243, 69 Misc. Rep. 494, judgment reversed (1911) 72 Misc. Rep. 52, 129 N. Y. Supp. 259; *Equitable Trust Co. of New York v. Taylor*, 131 N. Y. Supp. 475, 146 App. Div. 424; *Same v. Newman*, 131 N. Y. S. 1113, 146 App. Div. 953; *Rayburn v. Pennsylvania Casualty Co.*, 50 S. E. 762, 138 N. C. 379, 107 Am. St. Rep. 548; *Murphy v. Lafayette Mut. Life Ins. Co.*, 167 N. C. 334, 83 S. E. 461; *Pender v. North State Life Ins. Co.*, 79 S. E. 293, 163 N. C. 98; *Essington Enamel Co. v. Granite State Fire Ins. Co.*, 45 Pa. Super. Ct. 550; *Ellis v. Anderson*, 49 Pa. Super. Ct. 245; *Cauthen v. Hartford Life Ins. Co.*, 61 S. E. 428, 80 S. C. 204; *Noble v. Kansas City Life Ins. Co.*, 33 S. D. 458, 146 N. W. 606; *Supreme Lodge, United Benevolent Ass'n, v. Lawson*, 63 Tex. Civ. App. 273, 133 S. W. 907; *De Michele v. London & Lancashire Fire Ins. Co.*, 40 Utah, 312, 120 Pac. 846, Ann. Cas. 1914D, 1076; *Life Ins. Co. of Virginia v. Hairston*, 62 S. E. 1057, 108 Va. 832, 128 Am. St. Rep. 989; *Hartwig v. Aetna Life Ins. Co. of Hartford, Conn.*, 158 N. W. 280, 164 Wis. 20. See, also, *Sovereign Camp, Woodmen of the World, v. Dismukes (Miss.)* 38 South. 351.

In *Rayburn v. Pennsylvania Casualty Co.*, 138 N. C. 379, 50 S. E. 762, 107 Am. St. Rep. 548, the facts were these: Plaintiff applied through defendant's agent for an accident policy on October

21st. The policy was countersigned by the agent on October 23d, and recited that it was effective for one year from that day until October 23d of the following year, and further declared that it should not take effect unless the premium was actually paid previous to any accident for which claim should be made. The policy was delivered to plaintiff, and the premium paid on October 30th, he having in the meantime been injured, to the knowledge of the agent who delivered the same. It was held that there was a waiver of the provision of the policy requiring the payment of a premium previous to any accident for which claim should be made. So, too, where soliciting agent of insurer delivered policy and received premium knowing that insured was then ill, insurer is charged with his knowledge, and delivery is waiver of condition that policy should not become effective unless premium was paid while insured was in good health (*McClelland v. Mutual Life Ins. Co. of New York*, 111 N. E. 1062, 217 N. Y. 336, affirming judgment 147 N. Y. S. 1124, 162 App. Div. 926).

There is, however, no waiver of payment of the first premium by delivery, if the delivery is on the express condition that the policy shall not take effect until the premium is paid (*Perry v. Security Life & Annuity Co.*, 150 N. C. 143, 63 S. E. 679), or is for inspection only (*Gordon v. Prudential Ins. Co.*, 231 Pa. 404, 80 Atl. 882). And, though the mailing of a policy to an agent for unconditional delivery to the insured is a good delivery to the insured, it will not constitute an implied delivery waiving immediate payment of the premium (*Neff v. Metropolitan Life Ins. Co.*, 73 N. E. 1041, 39 Ind. App. 250). But, where an insurance company issues a policy and places it in the hands of a street broker for delivery and he delivers it to the insured, who pays the premium to him in good faith under the belief that he is an agent of the company, the company is estopped from claiming that the policy is not a binding contract of insurance (*Abrahamson v. Hartford Fire Ins. Co.*, 181 Ill. App. 254).

509-512. (g) Effect of acknowledgment in policy of receipt of premium

509 (g). It is the general rule that, where the policy delivered recites that the premium has been paid, such acknowledgment is conclusive in so far as it is necessary to fix the liability of the insurer.

Mutual Reserve Life Ins. Co. v. Heidel, 161 Fed. 535, 88 C. C. A. 477;
National Mut. Fire Ins. Co. v. Sprague, 92 Pac. 227, 40 Colo. 344;

Williams v. Empire Mut. Annuity & Life Ins. Co., 8 Ga. App. 303, 68 S. E. 1082; *Helbig v. Citizens' Ins. Co.*, 120 Ill. App. 58; *Adam v. Columbian Nat. Life Ins. Co.*, 191 Ill. App. 378; *Harrington v. Mutual Life Ins. Co.*, 21 N. D. 447, 131 N. W. 246, 34 L. R. A. (N. S.) 373; *Donahue v. Mutual Life Ins. Co. of New York* (N. D.) 164 N. W. 50. And see *Chasse v. Bankers' Reserve Fund Life Ins. Co.*, 27 S. D. 70, 129 N. W. 568; *Noble v. Kansas City Life Ins. Co.*, 33 S. D. 458, 146 N. W. 606; *Peever Mercantile Co. v. State Mut. Fire Ass'n of Canton*, 23 S. D. 1, 119 N. W. 1008, 19 Ann. Cas. 1236.

In view of Ky. St. § 679, the execution by the agent of a receipt acknowledging payment of a portion of the premium is not a waiver of the provision in that the policy should not be in force until payment was made. *Snedeker v. Metropolitan Life Ins. Co.*, 169 S. W. 570, 160 Ky. 119.

In *Peever Mercantile Co. v. State Mut. Fire Ins. Co.*, 25 S. D. 406, 127 N. W. 559, it was held that under Civ. Code S. D. § 1796, providing that all kinds of insurance are subject to the provisions of that chapter, a mutual fire insurance company is as effectively bound by section 1849 declaring an acknowledgment in a policy of the receipt of the premium conclusive evidence of its payment, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid, as an insurance company organized on any other basis.

It was, however, said in *Cauthen v. Hartford Life Ins. Co.*, 80 S. C. 264, 61 S. E. 428, that the acknowledgment of payment of a premium in a life policy is, like other receipts, only prima facie evidence, and casts the burden on the insurer to show that the premium was not in fact paid.

512. (h) Pleading and practice

512 (h). In an action on a life policy, stipulating that it should not be complete until payment of the first premium in cash, an instruction that, if insurer delivered the policy to its agent, who delivered it to insured, and if at no time thereafter and before the death of insured insurer gave notice that it wished to cancel the policy, insurer waived the condition of prepayment was misleading as ignoring the fact that the agent who delivered the policy might have violated instructions limiting his authority, with the knowledge of insured (*Life Ins. Co. of Virginia v. Hairston*, 62 S. E. 1057, 108 Va. 832, 128 Am. St. Rep. 989). Whether there was such an unconditional delivery of a policy as to constitute a waiver of pre-

payment of the premium is a question of fact for the jury (*De Michele v. London & Lancashire Fire Ins. Co.*, 40 Utah, 312, 120 Pac. 846, Ann. Cas. 1914D, 1076).

The sufficiency of the evidence to show a waiver of the payment of the first premium is considered in *Metropolitan Life Ins. Co. v. Williamson*, 174 Fed. 116, 98 C. C. A. 90; *Dargan v. Equitable Life Assur. Soc.*, 51 S. E. 125, 71 S. C. 356.

10. MATTERS RELATING TO THE FORM AND CONTENTS OF THE POLICY IN GENERAL

513-514. (a) Requisites of the contract in general

513 (a). The risk or cause of loss insured against is an essential term in a contract of property insurance (*O'Connor v. Columbia Ins. Co.*, 169 Mo. App. 150, 152 S. W. 396). If certain conditions or recitals are required by the charter, such conditions or recitals must of course be made part of the contract (*Porter v. Holmes*, 122 Ga. 780, 50 S. E. 923).

Section 209, c. 73, Hurd's Rev. St. Ill. 1909 (*Jones & A. Ann. St.* 1913, par. 6528), providing that policies insuring against loss of life resulting from accident shall state on their face the agreement with the insured, has no application to accident insurance on the assessment plan. *Rhodes v. Illinois Commercial Men's Ass'n*, 185 Ill. App. 439.

Rev. St. Mo. 1909, § 6934, prohibiting life insurance companies from making any contract of insurance other than as is plainly expressed in the policy issued, applies only to old line policies. *Easter v. Brotherhood of American Yeomen*, 157 S. W. 992, 172 Mo. App. 292.

517-519. (d) Kinds of policies—Valued and open policies

518 (d). An open or unvalued policy is one in which the value of the interest at risk is not fixed in the policy, but is estimated by a certain standard, and in case of loss is made out by proof (*Peninsular & O. S. S. Co. v. Atlantic Mut. Ins. Co.* (D. C.) 185 Fed. 172).

A covering agreement for the insurance of freightage of a cargo of lumber, the quantity of which was to be determined by the charterer, where the rate was already established, was not an open policy, as defined by Civ. Code Cal. § 2594, but was a valued policy, as defined by Civ. Code, § 2595 (*Victoria S. S. Co. v. Western Assur. Co. of Toronto*, 167 Cal. 348, 139 P. 807).

521-522. (f) Same—Blanket, floating and specific policies

521 (f). A policy for "\$5,000 on their unginned cotton while contained in six frame warehouses, * * *" without placing any specific amount on each warehouse, is a blanket policy (*Scottish Union & National Ins. Co. v. Moore Mill & Gin Co.*, 43 Okl. 370, 143 Pac. 12).

525-528. (i) Form and contents of policy

525 (i). In view of the rule that all essential elements of the contract must appear, the policy should state the risk or cause of loss insured against (*O'Connor v. Columbia Ins. Co.*, 169 Mo. App. 150, 152 S. W. 396). If the premium has been paid, the validity of the policy is not affected by the omission of a statement therein of the amount of the premium (*Wheaton v. Liverpool & London & Globe Ins. Co.*, 104 N. W. 850, 20 S. D. 62). The policy is not void because the name of the insured is not properly stated therein (*Romano v. Concordia Fire Ins. Co.*, 121 App. Div. 489, 106 N. Y. Supp. 63). Pasting in a policy, in space left for property description, a sheet left loose at one end, containing description of property and book warranty and iron safe and other clauses, is a substantial compliance with Rev. Laws Okl. 1910, § 3481, subds. 4, 6 (*Phoenix Ins. Co. of Hartford, Conn., v. Hall* [Okl.] 158 Pac. 903). The fact that the description of goods contained in paper sent to insured was not part of policy did not prevent the making of a contract of insurance, where application containing description was made part of policy (*Merchants' & Bankers' Fire Underwriters v. Brooks* [Tex. Civ. App.] 188 S. W. 243).

527 (i). A contract of life insurance being a voluntary one, the insurers have the right to designate the terms upon which they will become liable for a loss, and, in the absence of legislative interference, they may insert such conditions and agreements as they choose, so long as they are reasonable and not contrary to law or public policy (*Whiteside v. North American Accident Ins. Co.*, 93 N. E. 948, 200 N. Y. 320, 35 L. R. A. [N. S.] 696, reversing judgment 104 N. Y. Supp. 1150, 119 App. Div. 915). It is, however, the duty of an insurer accepting an application on a blank furnished by it, providing that it shall be the basis of the contract, to write the policy in accordance therewith (*German-American Ins. Co. v. Darrin*, 80 Kan. 578, 103 Pac. 87). Where insured merely ordered a certain amount of insurance upon a certain property, it could not

be presumed that he intended the policy, when prepared, to contain provisions other than the contract agreed upon, at least as to stipulations or policy provisions not required by law (*Springfield Fire & Marine Ins. Co. v. Snowden*, 191 S. W. 439, 173 Ky. 664).

528 (i). The charter of an insurance company provided that it should reserve a stipulated portion of the premiums for expenses, which portion should be stated in the contract. It was held in *Porter v. Holmes*, 122 Ga. 780, 50 S. E. 923, that a stipulation that all installments of annuities and disability claims, due within two years from the date of the policy, shall be paid from the fund formed by setting aside the first two annual premiums and \$2 out of and 15 per cent. of the annual premium on each \$200 annuity collected, and the balance of the fund shall be set apart for the payment of expenses, is a sufficient compliance with the charter requirement.

528-531. (j) Standard policies

528 (j). A Nebraska statute has provided for the adoption of a standard policy. It was held in *State v. Howard*, 96 Neb. 278, 147 N. W. 689, that under Laws 1913, c. 154, § 100, the insurance board should adopt the New York form of fire insurance policy as the basis of the form which they are directed to prepare. It was also said that the words "as nearly as practicable" as used in the statute, directing the insurance board to prepare a form of fire insurance policy "as nearly as practicable in the form known as the New York standard," means as nearly as practicable considering all other provisions contained in the insurance act which are inconsistent with or modify the provisions of the New York standard form. But it was also held that the portion of the statute which provides that the New York form of fire insurance policy shall be used as it "may be hereafter constituted" is invalid.

In action on fire policies issued in North Carolina, and stated by counsel to be in standard form prescribed by laws of New York, where no evidence of law of either state has been introduced, policies must be treated, for purposes of decision, as contracts of insurance at common law. *Eaton v. Globe & Rutgers Fire Ins. Co.*, 227 Mass. 354, 116 N. E. 536.

529 (j). It is well settled that the conditions of the standard policy cannot be varied, except in so far as the statute may specifically allow. The Minnesota Standard policy was involved in *Wild Rice Lumber Co. v. Royal Ins. Co.*, 99 Minn. 190, 108 N. W. 871.

The policy in this case was on lumber in a lumber yard and contained a "clear space" clause—a clause not contained in the standard form and at the time the policy was issued not permitted by statute. The court laid down the following principles: That the form of fire insurance policy prescribed by Gen. Laws 1895, p. 417, c. 175, as amended by Gen. Laws 1897, p. 468, c. 254, contains the only terms and conditions which can be incorporated in a contract of fire insurance, and the only changes which are specifically authorized by Gen. Laws 1897, p. 468, c. 254, § 53, are the general riders to be attached thereto containing provisions adding to or modifying those contained in the standard form; that Gen. Laws 1895, p. 417, c. 175, § 52, providing that the conditions of insurance shall be stated in full, and that neither the application nor the by-laws of the company shall be considered as warranty unless incorporated in full in the policy, does not authorize the parties to modify or add to the statutory form, but its purpose is to require that all the conditions of an insurance shall appear in one written instrument; and that the company had no authority to attach to the standard form of policy a clause by which the insured warrants the maintenance of a designated clear space about the insured premises.

Under Laws N. Y. 1913, c. 155, § 2, amending Insurance Law, § 107, touching the approval of insurance policies, subd. (i), a war rider, which had not been filed with or approved by superintendent of insurance, in violation of the statute, will be discarded, and the policy was valid and enforceable in its standard form (*Hopkins v. Connecticut General Life Ins. Co.*, 160 N. Y. Supp. 247, 174 App. Div. 23, reversing judgment [Sup.] 158 N. Y. Supp. 79).

The standard policy of South Dakota was prescribed by Laws 1905, c. 126, § 2. The statute was amended by Laws 1907, c. 170, § 1, providing that, where a company incorporated under the South Dakota laws as a mutual insurance company has special regulations, lawfully applicable to its organization, membership, policies, or contracts of insurance, such regulations and its by-laws shall apply to and form a part of the policy, providing they are indorsed on or attached to such policy or contract of insurance so as to form a part thereof. It was held in *Nielsen v. Merchants' Mut. Ins. Ass'n*, 26 S. D. 405, 128 N. W. 491, that it was not the legislative intent that a home mutual insurance company by merely designating some regulations adopted by it as "special" could overthrow the provisions of law otherwise binding upon all insurance com-

panies, but that such special regulations should be limited to those lawful regulations in relation to the organization, membership, or policies of mutual companies, which are special or peculiar to such mutual organizations, and the act does not authorize such a company to attach to the prescribed standard policy the so-called "iron-safe clause" or the "standard percentage valuation clause"; neither being a regulation specially applicable to mutual companies. The use of the standard form of fire policy prescribed by Laws S. D. 1909, c. 164, is compulsory, and its provisions not only constitute the contract between insurer and insured, but also the law governing the rights of the parties (*Hronish v. Home Ins. Co. of New York*, 33 S. D. 428, 146 N. W. 588).

In *Scharles v. N. Hubbard, Jr., & Co.*, 74 Misc. Rep. 72, 131 N. Y. Supp. 848, it was held that under the New York Insurance Law (Consol. Laws 1909, c. 28, § 121), permitting addition to a standard form policy of provisions necessary to clearly express the conditions of insurance, etc., a fire policy rider, reciting that the policy is issued upon warranty by assured that another company has insurance covering the same property in the same proportions and at no higher rate of premium, is valid. Similarly it was held in *Rolfe v. Patrons' Androscoggin Mut. Fire Ins. Co.*, 106 Me. 345, 76 Atl. 879, that under Rev. St. Me. 1903, c. 49, § 4, providing that a fire insurance company may write or print on separate slips, to be attached to a policy, provisions modifying or adding to those contained in the standard form of policy, more than one such modifying provision may be written or printed on the same slip, and that where an insurance company fills the blank space in the standard form of policy, stating the greatest amount of insurance, it may, by a rider attached to the policy, limit the extent of its liability.

In Louisiana it has been held that the standard policy (the New York form) adopted by the Legislature in 1898 (Act No. 105 of 1898, art. 3, § 22) was repealed by the valued policy law (Act No. 135 of 1900), adopting such valued policy; there being a conflict between the two forms of policies (*New Orleans Real Estate Mortgage & Securities Co. v. Teutonia Ins. Co.*, 128 La. 45, 54 South. 466).

The power of the Legislature to prescribe the form and conditions of policies of insurance has been upheld in *Continental Life Ins. & Inv. Co. v. Hattabaugh*, 21 Idaho, 285, 121 Pac. 81. But where the state insurance commissioner attempts to compel foreign

fire insurance companies to use a particular form of fire insurance policy, which has not been enacted as a law of the state, such companies are entitled to raise the question of his authority in a suit to restrain the commissioner from compelling them to use the form prepared by him (*Phenix Ins. Co. v. Perkins*, 101 N. W. 1110, 19 S. D. 59). And it has been held that the statute prescribing a standard form of fire insurance policy does not abridge any contractual rights of an applicant for insurance or give insurance companies any immunity for negligence of their agents in incorrectly reducing an insurance contract to writing (*Carroll v. Hartford Fire Ins. Co.*, 154 P. 985, 28 Idaho, 466).

531 (j). A fire policy in the standard form prescribed by Rev. St. 1903, c. 49, § 4, par. 7, is not to be treated as a legislative enactment, but as a voluntary contract, which, like any other, derives its force from the consent of the parties (*Dunton v. Westchester Fire Ins. Co.*, 71 Atl. 1037, 104 Me. 372, 20 L. R. A. [N. S.] 1058).

In some states an attempt has been made to prescribe a standard form of life policy. Generally these attempts have been confined to prescribing certain conditions and stipulations which may or must appear in life policies, without attempting to prescribe a complete form. The Massachusetts statute (St. 1907, p. 895, c. 576, § 75) authorizes the insurance commissioner to review all life policies to be issued in the state, and requires certain provisions to be inserted therein. It was held in *New York Life Ins. Co. v. Hardison*, 199 Mass. 190, 85 N. E. 410, 127 Am. St. Rep. 478, that no departure from the exact provisions required in insurance policies by St. 1907, p. 895, c. 576, § 75, should be permitted, unless it is too plain for doubt that the substitution is in every way as advantageous to the insured and as desirable as the prescribed provision. But in *Ætna Life Ins. Co. v. Hardison*, 199 Mass. 181, 85 N. E. 407, it was conceded that, as such provisions and the other prescribed parts of the policy are intended for the protection of the policy holders, if the policy contains them in substance, their form may be varied and additional provisions inserted beneficial to the insured, provided the statutory requirements are satisfied and left undiminished by that which is added. The particular provision involved in this case was one to the effect that the policy and the application shall constitute the entire contract between the parties, and that all statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties, and that no such statement

shall be used in defense of a claim under the policy, unless it is contained in a written application and a copy of such application shall be indorsed on or attached to the policy when issued. It was held that, where a contemplated policy submitted to the Insurance Commissioner for approval contained a statement, "This instrument contains the entire contract between the parties hereto, and all statements purporting to be made by the insured shall, in the absence of fraud, be deemed representations, and not warranties, and no such statement shall be used in defense of a claim under the contract, unless it be mentioned in the application therefor" it should be modified by the insertion after the words "this instrument" of the additional words "and the application attached hereto."

The terms required by the Insurance Act of 1907 to be inserted in life insurance policies should be a part of every contract of life insurance within the act. *Hollin v. Essex Mut. Ben. Ass'n of Newark*, 88 N. J. Law, 204, 96 Atl. 71.

A policy of life insurance, providing for payment of premiums in advance, declaring cash loan value, and providing three options on default of payment of any premium, is not in violation of Acts 1907, c. 457. *Mills v. National Life Ins. Co.*, 189 S. W. 691, 136 Tenn. 350.

531-533. (k) Size and style of type used in policies

532 (k). The Virginia statute (Code 1904, § 3252), providing that conditions and restrictions, to be effective, must be printed in type as large or larger than long primer type, was construed in *Equitable Life Assur. Soc. v. Wilson*, 110 Va. 571, 66 S. E. 836, and it was held that a limitation on the right to demand a paid-up policy, not printed in type of the required size or written in the policy, was invalid.

The New York statute (Insurance Law, § 107, subd. "b," cl. 6), requiring the provisions reducing indemnity under certain circumstances to be printed in bold-faced type, applies only to provisions in body of policy, and not in riders or attached papers (*Hopkins v. Connecticut General Life Ins. Co.* [Sup.] 158 N. Y. Supp. 79, judgment reversed 160 N. Y. Supp. 247, 174 App. Div. 23). So, too, that provision of the statute requiring exceptions in accident policy thereafter issued or delivered to be printed as prominently as benefits is held to apply to renewals of policies previously issued (*Hodgson v. Preferred Acc. Ins. Co. of New York*, 100 Misc. Rep. 155, 165 N. Y. Supp. 293).

The validity of a provision in an accident policy excusing payment in stated cases, having been approved by the insurance commissioner, is not subject to attack under St. 1913, § 1960, subsecs. 1, 2, and 9, on the ground that it was not in bold-faced type (*Lundberg v. Interstate Business Men's Acc. Ass'n*, 162 Wis. 474, 156 N. W. 482, Ann. Cas. 1916D, 667).

533 (k). A Kentucky Statute (St. 1903, § 679, which is part of the statute relating to co-operative insurance companies) provides that the policy or certificate, application, constitution, by-laws or other rules (which are required to be attached to the certificate that they may be considered part of it) shall be plainly printed, and no portion thereof shall be in type smaller than brevier. This provision, it has been held, does not apply in the case of the so-called old line companies.

Letzler's Adm'r v. Pacific Mut. Life Ins. Co., 119 Ky. 924, 85 S. W. 177; *Provident Sav. Life Assur. Soc. v. Elliott's Ex'r*, 93 S. W. 659, 29 Ky. Law Rep. 552.

533-535. (l) Contracts of mutual benefit associations and changes therein

533 (l). Unless there is an express provision in the laws of a mutual benefit association making a certificate of membership essential, such a certificate is not indispensable to the completion of a contract between a member and the society, and, in the absence of a certificate of membership, it is competent to look to the by-laws of the society to determine the obligations of the society, existing by reason of a good-standing membership therein (*Social Benev. Soc. No. 1 v. Holmes*, 56 S. E. 775, 127 Ga. 586). The charter, constitution, by-laws of the order, the application, medical examiner's certificate signed by the member, and the benefit certificate constitute the contract between the member and the society (*Royal League v. Kolin*, 169 Ill. App. 646).

11. BINDING SLIPS, RECEIPTS, OR MEMORANDA

535. (a) Validity of binding slips, receipts, or memoranda

535 (a). A memorandum of insurance known as a binder or binding slip, unless inhibited by statute, constitutes a valid contract.

El Dia Ins. Co. v. Sinclair, 228 Fed. 833, 143 C. C. A. 231; *Law v. Northern Assur. Co.*, 165 Cal. 394, 132 Pac. 590; *Lea v. Atlantic Fire Ins. Co.*, 168 N. C. 478, 84 S. E. 813.

A fire policy may be renewed by a binder, so as to entitle the insured to recover thereon as on a renewal policy (*Columbus Dry Goods Co. v. Globe & Rutgers Fire Ins. Co.*, 142 App. Div. 561, 127 N. Y. Supp. 589, affirmed in 206 N. Y. 662, 99 N. E. 1105).

535-537. (b) Nature and requisites

535 (b). A "binder" is a verbal contract of insurance in *præ-senti*, of which the insurance agent makes a memorandum, temporary in its nature, and intended to take the place of an ordinary policy till the same can be issued (*Norwich Union Fire Ins. Society v. Dalton* [Tex. Civ. App.] 175 S. W. 459). A binding slip issued on an application for insurance is a mere written memorandum of the most important terms of a preliminary contract of insurance, intended to give temporary protection pending investigation of the risk, and subject to all the conditions of the contemplated policy, even though it may never issue. It protects the applicant for insurance against sickness between its date and the delivery of the policy only in case the application is accepted and the policy delivered (*Gardner v. North State Mut. Life Ins. Co.*, 163 N. C. 637, 79 S. E. 806, 48 L. R. A. [N. S.] 714, Ann. Cas. 1915B, 652).

It is essential to a contract of this kind, as in an ordinary contract of insurance, that there be a meeting of minds as to the terms of the contract. So, in *Bradley v. Standard Life & Accident Ins. Co.*, 112 App. Div. 536, 98 N. Y. Supp. 797, reversing 46 Misc. Rep. 41, 93 N. Y. Supp. 245, where the agent offered to bind the risk until the plaintiff decided what risks he desired to be covered and asked plaintiff to communicate with him at a certain time, it was held that, on the failure of the plaintiff to answer the agent's letter, there was no contract of insurance. But some of the terms may be understood or left to be fixed at a future time. Thus it has been held that the rate of premium may be left unexpressed, in which case the usual and customary rate for that class of risks would be understood (*Jacobs v. Atlas Ins. Co.*, 148 Ill. App. 325). Thus a binder is not void for failure to express consideration, where insured had agreed to pay regular premium on policy to be issued (*Nord Deutsche Ins. Co. v. Hart*, 230 Fed. 809, 145 C. C. A. 119). So, where the agent did not know the rate on the particular class of property insured, that fact did not prevent the binder taking effect (*Queen Ins. Co. v. Hartwell Ice & Laundry Co.*, 7 Ga. App. 787, 68 S. E. 310). Similarly, where the rate was left

blank in a binder for fire insurance because it had not been fixed by the chairman of the local board of fire underwriters, whose duty it was to fix the rate, the contract bound both parties to such rate as might, in due course, be so fixed (*British American Ins. Co. v. Wilson*, 60 Atl. 293, 77 Conn. 559). And in *State ex rel. Equitable Life Assur. Soc. v. Robertson* (Mo. App.) 191 S. W. 989, it was held that where deceased applied for life policy, and a "binding receipt" was issued, but insurer conditionally accepted application at a higher premium rate and policy had not been accepted by deceased at his death, no completed contract for insurance existed and beneficiary could not recover.

536 (b). A certificate by brokers is not a contract or part of a contract of insurance, but merely a memorandum certifying that they had effected insurance with defendant, and putting plaintiff upon inquiry to ascertain the terms of the policy (*California Canneries Co. v. Canton Ins. Office*, 25 Cal. App. 303, 143 Pac. 549).

537 (b). A printed receipt for the first premium of a life policy reciting that the applicant was insured from its date, if accepted as an insurable risk, was a contract of temporary insurance from that date, although the applicant died before receiving the policy which provided for a larger premium (*Kempf v. Equitable Life Assur. Soc. of United States* [Mo. App.] 184 S. W. 133).

537-538. (c) Conditions embraced in contract—Payment of premium

537 (c). It is a general rule that the contract evidenced by a binder is subject to the usual terms and conditions of the policy issued by the company.

Law v. Northern Assur. Co., 165 Cal. 394, 132 Pac. 590; *British American Ins. Co. v. Wilson*, 77 Conn. 559, 60 Atl. 293; *Queen Ins. Co. v. Hartwell Ice & Laundry Co.*, 7 Ga. App. 787, 68 S. E. 310; *Jacobs v. Atlas Ins. Co.*, 148 Ill. App. 325; *Columbus Dry Goods Co. v. Globe & Rutgers Fire Ins. Co.*, 142 App. Div. 561, 127 N. Y. Supp. 589, affirmed in 206 N. Y. 662, 99 N. E. 1105.

So, too, where a fire insurance binder provided that the insurers assumed and made binding the amount of insurance set opposite their names under the conditions of the New York standard form of policy, all the conditions of a policy of that form were applicable to the binder (*British American Ins. Co. v. Wilson*, 60 Atl. 293, 77 Conn. 559).

A slip issued by a mutual fire insurance company's agent constitutes a contract of insurance which the company could not vary by

issuing a policy containing a clause prohibiting other insurance. *Mutual Fire Ins. Co. of Montgomery County v. Goldstein*, 86 Atl. 35, 119 Md. 83, Ann. Cas. 1914C, 723.

Though a binder in renewal of a policy is subject to the conditions of the policy, it is no objection to such a binder that it covers less property than the original contract (*Columbus Dry Goods Co. v. Globe & Rutgers Fire Ins. Co.*, 142 App. Div. 561, 127 N. Y. Supp. 589, affirmed in 206 N. Y. 662, 99 N. E. 1105).

538. (d) Power of agent

538 (d). A general agent of insurer has implied authority to write temporary policies, and insurer will be bound by his agreement that loss will be covered pending negotiations for larger policy (*Michigan Idaho Lumber Co. v. Northern Fire & Marine Ins. Co.*, 35 N. D. 244, 160 N. W. 130). Where a soliciting agent for an insurance company executed a binding receipt to an applicant for insurance, making the insurance in force from the date of the receipt, providing the application was accepted and the policy issued the insurer was not entitled to deny the authority of such soliciting agent to make such a contract in the absence of notice of a limitation of the agent's authority to the applicant (*Starr v. Mutual Life Ins. Co. of New York*, 83 Pac. 116, 41 Wash. 228).

In *Union Central Life Ins. Co. v. Robinson*, 148 Fed. 358, 78 C. C. A. 268, 8 L. R. A. (N. S.) 883, the facts were these: A general agent of defendant life insurance company was entitled by his contract of agency to a commission of 50 per cent. of the first premium on policies secured by him, but such commission was to accrue only when the premium was paid in cash to the company, and he was required to hold all sums collected by him in trust. He took an application for a policy, which was forwarded to the company, and pending its acceptance he issued to the applicant what was called a "binding receipt" for the amount of the first premium, which provided that the insurance should be in force from its date provided the application was accepted; otherwise the amount should be returned. He was authorized to issue such receipt where the premium was in fact paid, but in this case he received a note for one-half the premium, which he discounted, and agreed for purposes of his own to give the applicant credit for one-half on account of his commission. The applicant died, no policy having been delivered, and the beneficiary brought action on the receipt, alleging that the

application had been accepted prior to the death. It was held that, since the premium was not in fact received by the agent and held in trust, as required by his contract, the transaction by which the receipt was issued was not binding upon the company unless it had knowledge or notice of the facts, and that such notice could not be imputed to it because of the knowledge of the agent.

538-539. (e) Pleading and practice

539 (e). In an action on an accident insurance policy, plaintiff, the insured, had the burden of proving that defendant's soliciting agent had authority, or that it was within the apparent scope of his authority, to issue a policy fee receipt binding defendant to the insurance in advance of the issuance of the policy (*People's Mut. Life, Accident & Health Ins. Co. v. Powell*, 98 Ark. 166, 135 S. W. 823).

The sufficiency of the evidence to show that a binding slip for temporary insurance, from the time application to an agent for insurance is made until a policy is issued or the risk is declined, was executed under authority by defendant's agent, so as to become the obligation of defendant was considered in *Jacobs v. Atlas Ins. Co.*, 148 Ill. App. 825.

V. VALIDITY OF CONTRACT

1. VALIDITY OF THE CONTRACT IN GENERAL

542-544. (a) General principles

542 (a). Parties competent to contract are at liberty to incorporate such provisions in a contract of insurance as they choose, providing such provisions are not inhibited by law or by good morals (*Blume v. Pittsburgh Life & Trust Co.*, 183 Ill. App. 295, affirmed 104 N. E. 1031, 263 Ill. 160, 51 L. R. A. [N. S.] 1044, Ann. Cas. 1915C, 505). So the parties to an employer's liability policy could, by their contract, limit the insurer's liability and exempt it from liability for damages resulting from the employer's violation of the Labor Law (*Mason-Henry Press v. Aetna Life Ins. Co.*, 211 N. Y. 489, 105 N. E. 826, affirming 139 N. Y. Supp. 1133, 155 App. Div. 876).

An insurance company may insert in its policy reasonable conditions as to the use of the property insured. *Crowell v. Maryland Motor Car Ins. Co.*, 169 N. C. 35, 85 S. E. 37, Ann. Cas. 1917D, 50.

Unless the contract of insurance is void under settled principles of law or specific provisions of the statute, it is to be regarded as measuring the rights of the parties (*Mutual Ben. Life Ins. Co. v. O'Brien* [Ky.] 116 S. W. 750), and will be enforced as between the parties, irrespective of the reasonableness or unreasonableness of specific provisions (*Berner v. Brotherhood of American Yeomen*, 154 Ill. App. 27).

543 (a). The fact that a policy is invalid in part does not necessarily render it invalid as a whole, so long as the invalidity does not affect the entire risk.

Oliphant v. American Health & Accident Ass'n, 147 Iowa, 653, 126 N. W. 806; *Herzog v. Palatine Ins. Co., Limited*, 36 Wash. 611, 79 Pac. 287.

So, too, the fact that certain stipulations in the policy contravene the statute will not render the whole contract void (*Friedland v. Commonwealth Fire Ins. Co.*, 143 App. Div. 570, 128 N. Y. Supp. 705). Thus the fact that one of several beneficiaries named falls within a class of persons prohibited by statute from being benefi-

ciary does not affect the rights of the other persons named (*Oliphant v. American Health & Accident Ass'n*, 147 Iowa, 656, 126 N. W. 806). Similarly it was held in *Fraternal Relief Ass'n v. Edwards*, 9 Ga. App. 43, 70 S. E. 265, that a life policy is not void because the risk of insured's killing himself while sane is not excepted therein, though Civ. Code Ga. 1910, § 2500, releases an insurer from obligation under a life policy, where insured commits suicide. Even though liability thereunder would not be enforced if the insured killed himself while sane, the policy would be enforceable if insured's death were otherwise caused.

544-545. (b) Validity dependent on considerations of public policy

545 (b). A policy indemnifying an employer against loss for injuries to employes is not contrary to public policy, since it does not lessen the employer's liability, but merely increases his means of meeting it.

Breeden v. Frankfort Marine Accident & Plate Glass Ins. Co., 220 Mo. 327, 119 S. W. 576; *Royle Min. Co. v. Fidelity v. Casualty Co.*, 126 Mo. App. 104, 103 S. W. 1098.

So, too, it has been held that if an employer's liability policy does not purport to insure against any acts in violation of law, but has for its purpose the indemnification of insured against loss from liability imposed by law upon insured for damages on account of bodily injuries or death suffered by an employé of insured, construing it to cover a liability arising against the insured by reason of an injury suffered by a minor while engaged in the performance of a task prohibited by statute to be assigned to him does not render the policy void (*London Guarantee & Accident Co. v. Morris*, 156 Ill. App. 533).

A contract insuring an individual against damages for personal injuries caused by his own negligence is valid. *Westinghouse-Church-Kerr Co. v. Long Island R. Co.*, 141 N. Y. Supp. 644, 80 Misc. Rep. 127.

The owner of an automobile may not, under the Iowa statute (Code Supp. 1907, § 1709, subd. 5), insure against liabilities imposed on him by law; the particular clause in question referring only to injuries to the insured himself (*American Fidelity Co. v. Bleakley*, 157 Iowa, 442, 138 N. W. 508). It has, however, been held in Washington that an insurance policy which indemnifies a taxicab company against loss caused by the violation of a city ordi-

nance by its employ  s is not void on the ground of public policy (Taxicab Motor Co. v. Pacific Coast Casualty Co., 73 Wash. 631, 132 Pac. 393).

In rent insurance, the parties may stipulate for a method of ascertaining and computing the loss of rent without violating the rule that insurance shall furnish only indemnity against loss (Whitney Estate Co. v. Northern Assur. Co., 155 Cal. 521, 101 Pac. 911, 23 L. R. A. [N. S.] 123, 18 Ann. Cas. 512).

Since insurance is indemnity, a contract for a fixed sum (a "valued policy") would be illegal and wagering. *Norwich Union Fire Ins. Society v. Bainbridge Grocery Co.*, 16 Ga. App. 432, 85 S. E. 622.

Life and accident insurers have a right to limit their insurance to persons not engaged in hazardous or extrahazardous employments (*Quinn v. North American Union*, 162 Ill. App. 319). Similarly it has been held in Montana (*Schwanekamp v. Modern Woodmen of America*, 44 Mont. 526, 120 Pac. 806) that the provision of Rev. Codes,   5057, declaring that any contract by which one is restrained from exercising a lawful trade of any kind is void, only refers to a contract which by its terms restrains one from exercising a lawful business, and does not apply to make void a provision in a life insurance policy avoiding it, should insured engage in the liquor business.

545-546. (c) Legality of object

546 (c). It is not illegal for one to protect himself by insurance from an adverse result of uncertain litigation (*Gould v. Brock*, 69 Atl. 1122, 221 Pa. 38).

546-548. (d) Same—Property used in illegal business

547 (d). A policy covering the furniture in a bawdyhouse is not void as against public policy, in the absence of a stipulation to that effect, since the contract of insurance was not necessary to the welfare of the house and in no way promoted the unlawful business (*Conithan v. Royal Ins. Co.*, 91 Miss. 386, 45 South. 361, 18 L. R. A. [N. S.] 214, 124 Am. St. Rep. 701, 15 Ann. Cas. 539). And to the same effect is * etna Ins. Co. v. Heidelberg*, 112 Miss. 46, 72 South. 852, L. R. A. 1917B, 253, modifying judgment 72 South. 470.

So, too, where a dealer in musical instruments placed a mechanical piano in a house of ill fame to induce the proprietress to pur-

chase it, without any other understanding, a fire policy covering the piano which was burned in the house could not be defended on the ground that it was void as against public policy (*Electrova Co. v. Spring Garden Ins. Co.*, 72 S. E. 306, 156 N. C. 232, 35 L. R. A. [N. S.] 1216).

In accordance with the general rule, it has been held in *Kellogg v. German-American Ins. Co.*, 133 Mo. App. 391, 113 S. W. 663, that intoxicating liquors, being recognized in that state as property, are insurable, unless the insurance is for the purpose of protecting illegal traffic therein, and it was said that if, when a druggist insured his drug stock, containing a quantity of beer and whisky, he intended to conduct an unlawful business and sell the liquor contrary to law, the insurance would be void as directly protecting plaintiff in his illegal purposes, but if the insured when he procured the insurance, was actuated by an intent to conduct a legitimate drug store and use the liquors only in connection with that business in the usual and lawful manner, the insurance was valid. The court said, further, that the fact that the druggist occasionally made unlawful sales and had a thriving trade in whisky and beer did not establish as a matter of law that his business and practices were unlawful, rendering a policy on the stock void.

551-553. (h) Mistake and fraud in general

551 (h). To render a contract of insurance void because of mistake the mistake must relate to a material fact. So, where insured erroneously believing that a prior fire policy had terminated, procured a new policy, the erroneous belief was merely collateral and not an essential element of the contract evidenced by the new policy, and the new policy was valid (*National Union Fire Ins. Co. v. Dorroh*, 63 Tex. Civ. App. 620, 133 S. W. 475). In view of the general rule as to partial invalidity if a fire insurance policy covers several items, the fact that one item was inserted by mistake of the parties would not affect the validity of the contract as to other items (*Herzog v. Palatine Ins. Co., Limited*, 79 Pac. 287, 36 Wash. 611).

552 (h). Fraud to be available as a defense must be specially pleaded, and only such fraud as is averred can be considered (*Delaware Ins. Co. v. Hill* [Tex. Civ. App.] 127 S. W. 283). If the insurer in an action on the policy makes no general denial, but relies on the affirmative defense of fraud thus assuming the burden of

proof, a peremptory instruction for defendant is error, though the weight of evidence is with it, if in fact the evidence as to fraud, though largely uncontradicted, is conflicting and leaves inferences and deductions to be drawn in arriving at the ultimate fact (*Haughton v. Ætna Life Ins. Co.*, 165 Ind. 32, 73 N. E. 592; *Id.* [Ind. App.] 72 N. E. 652).

On an issue as to fraud on part of the plaintiff, possession of the policy by plaintiff raises a presumption that he knew the conditions therein. *Osterhoudt v. Prudential Ins. Co.*, 136 App. Div. 123, 120 N. Y. Supp. 641.

The sufficiency of the evidence to support an allegation of fraud is considered in *Mutual Life Ins. Co. v. Orenshaw* (Tex. Civ. App.) 116 S. W. 375 (substitution of urine sent to medical examiner); *Williams v. St. Louis Life Ins. Co.*, 189 Mo. 70, 87 S. W. 499, reversing 97 Mo. App. 449, 71 S. W. 376 (substitution of another person to take the medical examination). And see, generally, *Wheelock v. Home Life Ins. Co.*, 115 Minn. 177, 131 N. W. 1081; *Hardy v. Masonic Ben. Ass'n*, 103 Miss. 106, 60 South. 48; *Osterhoudt v. Prudential Ins. Co. of America*, 120 N. Y. Supp. 641, 136 App. Div. 123.

In action on insurance policy, defense that it was void because of fraud practiced by insured, may be pleaded without repaying or offering to repay premiums received by insurer. *Columbian Nat. Life Ins. Co. v. Mulkey*, 146 Ga. 267, 91 S. E. 106.

553 (h). The Massachusetts statute provides (Rev. Laws, c. 118, § 73) that every policy containing a reference to the application must have attached a correct copy thereof, and unless so attached the same shall not be considered as part of the policy or received in evidence. It was held that, where insurer claimed the existence of a fraudulent conspiracy to obtain insurance, it could not prove a question and answer, not contained in the application or otherwise attached to the policy, in proof of the fraud, prior to the introduction of evidence to establish the conspiracy (*Paquette v. Prudential Ins. Co.*, 79 N. E. 250, 193 Mass. 215).

The sufficiency of the evidence of fraud on the part of the agent and connivance of the insured is considered in *Payne v. Mutual Life Ins. Co.*, 141 Fed. 339, 72 C. C. A. 487.

554-556. (j) Fraud of company or agent

554 (j). If the agent of the insurer has been guilty of fraud in inducing the insured to take out the policy, the latter may have the

policy declared void in equity or may avoid his own obligations thereunder.

Pflester v. Missouri State Life Ins. Co., 116 Pac. 245, 85 Kan. 97;
Briggs v. Life Ins. Co. of Virginia, 155 N. C. 73, 70 S. E. 1068.

One unable to read, who signs an application for insurance upon false representations of the insurer's agent as to its contents, is not bound by his signature. *Colley v. National Live Stock Ins. Co.*, 185 Mo. App. 616, 171 S. W. 663.

However, if one is acting merely as an insurance broker, the fact that he receives some compensation from the insurers for placing the business with them does not constitute him their agent so as to render them liable for his misrepresentations.

Monast v. Manhattan Life Ins. Co., 79 Atl. 932, 32 R. I. 557. And see
Mahon v. Royal Union Mut. Life Ins. Co., 134 Fed. 732, 67 C. C. A. 636.

If defendant was able to read an application for a policy, but failed to do so, he was bound by the terms of a policy conforming to the application, notwithstanding such terms were in conflict with representations made by the soliciting agents (*Vette & Hoffman v. Evans*, 86 S. W. 504, 111 Mo. App. 588). So, too, one joining a fraternal benefit society is presumed to know the by-laws existing at the time of his becoming a member, and the beneficiary named in the certificate is not entitled to rely upon alleged fraudulent representations as to what such by-laws contain or did not contain (*Supreme Lodge Knights & Ladies of Honor v. Benes*, 135 Ill. App. 314, affirmed 83 N. E. 127, 231 Ill. 134, 14 L. R. A. [N. S.] 540, 121 Am. St. Rep. 304).

555 (j). Though, as stated in the text, it has been held that misrepresentations as to future profits do not constitute such fraud as will sustain a rescission in equity, it has nevertheless been held, in *Sikes v. Life Ins. Co. of Virginia*, 144 N. C. 626, 57 S. E. 391, that where plaintiffs alleged that they took out certain life insurance policies on false representations of defendant company's agents that at the end of 10 years they would get back all they had put in, with 4 per cent. interest, and the testimony showed that plaintiffs were nearly illiterate, could not understand what was written in the policies, that the agents assured them that they would get their money back in 10 years with interest, the question of the fraud of the agents in inducing plaintiffs to take out the policies should have been submitted to the jury. Similarly it was held in *Briggs v. Life*

Ins. Co. of Virginia, 155 N. C. 73, 70 S. E. 1068, that where an applicant for life insurance who was an old man, unable to read, relied on the reading of the policy by and representations of insurer's agent, the act of such agent in taking advantage of his illiteracy by falsely representing that the policy contained a provision for return of the premiums, with interest, at the end of the insurance period, amounted to a fraud in law.

On the other hand, it has been held that the beneficiaries have no right of action against the association by reason of its falsely representing that it was in a flourishing financial condition, thereby inducing the member to believe that it was able to pay all claims in full, under which belief he paid all assessments made up to the time of his death (*Conard v. Southern Tier Masonic Relief Ass'n*, 93 N. Y. Supp. 626, 101 App. Div. 611).

The sufficiency of the evidence to show fraud of the company or its agent is considered in *Wilson v. Life Ins. Co. of Virginia*, 155 N. C. 173, 71 S. E. 79; *Munich Reinsurance Co. v. United Surety Co.*, 113 Md. 200, 77 Atl. 579.

556-557. (k) Policy procured without the knowledge of insured

556 (k). Where one, though not duly authorized, assumes to act as agent for another, and in his name procures a fire policy on property which is subsequently burned, the person in whose name the policy has been issued may ratify the assumed agency and assert liability against the insurer to the same extent as if authority had been originally conferred.

Todd v. German-American Ins. Co., 2 Ga. App. 789, 59 S. E. 94. See, also, *Marqusee v. Hartford Fire Ins. Co.*, 198 Fed. 475, 119 C. C. A. 251, 42 L. R. A. (N. S.) 1025; *Id.*, 198 Fed. 1023, 119 C. C. A. 275, 42 L. R. A. (N. S.) 1025.

So, too, it has been held that, where insured's father purchased an accident policy for insured without his knowledge, but insured, after injury, made a claim and brought suit on the policy, he thereby ratified his father's acts, and was bound by the conditions of the policy, in the absence of fraud or imposition (*Johnson v. Maryland Casualty Co.*, 60 Atl. 1009, 73 N. H. 259, 111 Am. St. Rep. 609).

557-558. (l) Alteration of application or policy

557 (l). It is a question for the jury whether an application for a life policy has been materially altered by the company's agent

(*Waters v. Security Life & Annuity Co.*, 144 N. C. 663, 57 S. E. 437, 13 L. R. A. [N. S.] 805). And where a life insurance company forwarded a policy to its agent, with instructions to deliver it to insured, and the agent placed a rider on the policy and then delivered it to insured, who accepted it under the belief that the rider had been placed thereon by the company itself, insured could hold the company in accordance with the terms of the rider (*Germania Life Ins. Co. v. Bouldin*, 100 Miss. 660, 56 South. 609).

2. WHAT LAW GOVERNS IN DETERMINING THE VALIDITY OF THE CONTRACT

558-559. (a) The general rule—Validity determined by the law of the place where the contract is made

559 (a). In the absence of stipulations or other evidence of a contrary intent, the validity of the contract of insurance is to be determined by the law of the place where the contract is made.

Mutual Life Ins. Co. of New York v. Hilton-Green, 202 Fed. 113, 120 C. C. A. 267; *Automobile Ins. Co. of Hartford, Conn., v. Guaranty Securities Corp.* (D. C.) 240 Fed. 222; *Flittner v. Equitable Life Assur. Soc.*, 30 Cal. App. 209, 157 Pac. 630; *Anderson v. Royal League*, 153 N. W. 853, 130 Minn. 416, L. R. A. 1916B, 901, Ann. Cas. 1917C, 691; *Lukens v. International Life Ins. Co.*, 269 Mo. 574, 191 S. W. 418; *Mock v. Supreme Council of Royal Arcanum*, 121 App. Div. 474, 106 N. Y. Supp. 155; *Roberts v. Modern Woodmen*, 133 Mo. App. 207, 113 S. W. 726; *Paulhamus v. Security Life & Annuity Co.* (C. C.) 163 Fed. 554.

A life policy executed at Milwaukee and payable there by its terms, which also provided that it was made and to be performed in Wisconsin, was a Wisconsin contract, though both insured and the beneficiary resided in another state. *Northwestern Mut. Life Ins. Co. v. Adams*, 144 N. W. 1108, 155 Wis. 335, 52 L. R. A. (N. S.) 275.

560-561. (b) Exceptions—Law of place of performance—Law of domicile of insurer

560 (b). Notwithstanding the provisions of Gen. Code Ohio, § 9577, provisions in contracts for insurance of numerous motor cars, waiving cancellation clause of policies, are not invalid where property was not located in Ohio (*Automobile Ins. Co. of Hartford, Conn., v. Guaranty Securities Corp.* [D. C.] 240 Fed. 222).

561 (b). Where the question of validity is dependent directly on the powers of the insurer or affects fundamental rights of the insured, generally the law under which the insurer was organized or the law of its domicile, will govern (*Southern Mut. Aid Ass'n v. Cobb*, 60 Fla. 198, 53 South. 505). But express statutory provisions of another state in which it is permitted to do business and in which the contract is made usually override the law of the domicile (*Dennis v. Modern Brotherhood of America*, 119 Mo. App. 210, 95 S. W. 967).

561. (c) Contract valid where made is valid everywhere

561 (c). A contract of insurance made in another state will be treated as valid in Arkansas if valid in the state where made.

Massachusetts Bonding & Ins. Co. v. Home Life & Accident Co., 119 Ark. 102, 178 S. W. 314; *St. Francis Box & Lumber Co. v. E. F. Perry & Co.*, 125 Ark. 413, 189 S. W. 47.

The receiver of an insolvent foreign insurance company is not forbidden by public policy to enforce in this state an assessment against the holder of a policy issued in the foreign state merely because the policy could not have been validly issued in this state (*Stone v. Old Colony St. Ry. Co.*, 212 Mass. 459, 99 N. E. 218).

562. (d) Same—Modification of rule on considerations of public policy

562 (d). Though the general rule undoubtedly is that stipulations in a policy which are contrary to the public policy of the state where enforcement is sought, though valid where the contract was made will not be enforced (*Mutual Life Ins. Co. v. Mullan*, 107 Md. 457, 69 Atl. 385), some jurisdictions have failed to apply it. Thus in *Clarey v. Union Cent. Life Ins. Co.*, 143 Ky. 540, 136 S. W. 1014, 33 L. R. A. (N. S.) 881, the court gave effect to a provision limiting the time of bringing suit on the policy though it was conceded that such stipulation was contrary to the public policy of Kentucky.

563-564. (f) What is the place of contract—Approval of risk

563 (f). The place of contract is the place where the minds of the parties met and the contract became complete.

Stone v. Old Colony St. Ry. Co., 212 Mass. 459, 99 N. E. 218; *Swing v. B. E. Brister & Co.*, 87 Miss. 516, 40 South. 146, 8 Ann. Cas. 740; *Attna Ins. Co. v. Mount*, 45 South. 835, 90 Miss. 642, 15 L. R. A. (N. S.) 471, modifying 90 Miss. 642, 44 South. 162, 15 L. R. A. (N. S.) 471;

White v. Empire State Degree of Honor, 47 Pa. Super. Ct. 52; *Globe & Rutgers Fire Ins. Co. of New York v. David Moffat Co.*, 154 Fed. 13, 83 C. C. A. 91.

564-565. (g) Same—Delivery of policy

564 (g). In view of the general rule that the place where the contract became complete is the place of contract, it naturally follows that if a delivery of the policy completes the contract the place of delivery is the place of contract the law of which will govern the contract.

Prudential Life Ins. Co. of America v. Fusco's Adm'r, 140 S. W. 566, 145 Ky. 378; *Stone v. Old Colony St. Ry. Co.*, 212 Mass. 459, 99 N. E. 218; *Roberts v. Modern Woodmen of America*, 113 S. W. 726, 133 Mo. App. 207; *Lukens v. International Life Ins. Co.*, 269 Mo. 574, 191 S. W. 418; *Napier v. Bankers' Life Ins. Co.*, 100 N. Y. Supp. 1072, 51 Misc. Rep. 283; *Vanderbeck v. Protected Home Circle*, 163 N. Y. Supp. 80, 98 Misc. Rep. 691; *Globe & Rutgers Fire Ins. Co. v. David Moffat Co.*, 154 Fed. 13, 83 C. C. A. 91; *Iowa State Traveling Men's Ass'n v. Ruge*, 242 Fed. 762, 155 C. C. A. 350. And see *Williams v. Supreme Conclave Improved Order of Heptasophs*, 172 N. C. 787, 90 S. E. 888.

So, where a policy was issued at the home office of the company and there deposited in the mail, directed to the insured in another state, the place of mailing, being the place of delivery, was the place of contract (*Stone v. Penn Yan K. P. & B. Ry.*, 197 N. Y. 279, 90 N. E. 843, 134 Am. St. Rep. 879, affirming 125 App. Div. 94, 109 N. Y. Supp. 374). Where a life policy when first issued by the home office was forwarded to the local agent under regulations permitting him to deliver it to the applicant only if no material change had occurred in his health, its delivery by the local agent in Kentucky made the policy a Kentucky contract (*Jefferson v. New York Life Ins. Co.*, 152 S. W. 780, 151 Ky. 609). And where application for guaranty bond was made through a resident agent of a Massachusetts company, and the bond, prepared at the home office, was sent to the agent with authority to deliver it to insured in Rhode Island, the contract was made in such state, and the Massachusetts statute affecting the bond was inadmissible (*Grand Lodge, A. O. U. W., of Rhode Island v. Massachusetts Bonding & Ins. Co.*, 38 R. I. 276, 94 Atl. 859).

But as it is the place of final assent that must be regarded as the place of contract, if anything remains to be done after delivery to complete the contract, the place where such act is to be done is the

place of contract. So, if acceptance by the insured is necessary, the place where the acceptance is manifested becomes the place of contract.

The place where the insured signified his acceptance of the policy was regarded as the place of contract in *Supreme Lodge K. P. v. Meyer*, 198 U. S. 508, 25 Sup. Ct. 754, 49 L. Ed. 1148, affirming 178 N. Y. 63, 70 N. E. 111, 64 L. R. A. 839, and 82 App. Div. 359, 81 N. Y. Supp. 813; *Presbyterian Ministers' Fund v. Thomas*, 126 Wis. 281, 105 N. W. 801, 110 Am. St. Rep. 919; *Kavanaugh v. Supreme Council of Royal League*, 158 Mo. App. 234, 138 S. W. 359; *Swing v. Dayton*, 108 N. Y. Supp. 155, 124 App. Div. 58, affirmed in 196 N. Y. 503, 89 N. E. 1113; *Swing v. Marion Pulp Co.*, 47 Ind. App. 199, 93 N. E. 1004; *Swing v. Wellington*, 44 Ind. App. 455, 89 N. E. 514.

565-566. (h) Same—Payment of premium

566 (h). If by the terms of the policy or otherwise the contract is not to take effect until the first premium is paid, the place where the policy is delivered and the premium paid is the place of contract.

Flittner v. Equitable Life Assur. Soc. of the United States, 157 Pac. 630, 30 Cal. App. 209; *City of Lake Charles v. Equitable Life Assur. Soc.*, 38 South. 578, 114 La. 836; *Mutual Life Ins. Co. of New York v. Mullen*, 107 Md. 457, 69 Atl. 385; *Davis v. New York Life Ins. Co.*, 212 Mass. 310, 98 N. E. 1043, 41 L. R. A. (N. S.) 250; *Head v. New York Life Ins. Co.*, 241 Mo. 403, 147 S. W. 827; *Id.*, 241 Mo. 420, 147 S. W. 832; *Pool v. New England Mut. Life Ins. Co.*, 108 N. Y. Supp. 431, 123 App. Div. 885.

So, where a policy of insurance on an American vessel was issued in England and there delivered to the broker, who paid the premium, it was an English contract governed by English law (*Northwestern S. S. Co. v. Maritime Ins. Co.* [C. C.] 161 Fed. 166).

566. (i) Same—Countersigning by agent

566 (i). The policy may provide that it shall not take effect until countersigned by the agent. In such case the place where the agent countersigns the policy is the place of contract.

Dolan v. Supreme Council of Catholic Mut. Ben. Ass'n, 113 N. W. 10, 13 L. R. A. (N. S.) 424, judgment overruled on rehearing 152 Mich. 266, 116 N. W. 383, 16 L. R. A. (N. S.) 555, 15 Ann. Cas. 232; *Orient Ins. Co. v. Rudolph*, 69 N. J. Eq. 570, 61 Atl. 26; *Friedland v. Commonwealth Fire Ins. Co. of Ottumwa, Iowa*, 128

N. Y. Supp. 705, 143 App. Div. 570; *Hardiman v. Fire Ass'n of Philadelphia*, 61 Atl. 990, 212 Pa. 383; *S. M. Smith Ins. Agency v. Hamilton Fire Ins. Co.*, 69 W. Va. 129, 71 S. E. 194.

566-567. (j) Same—Stipulations as to place of contract

566 (j). It is within the powers of the parties to an insurance contract to provide by stipulation that the contract shall be governed by the law of a particular place.

Russell v. Grigsby, 168 Fed. 577, 94 C. C. A. 61; *Green v. Security Mut. Life Ins. Co.*, 140 S. W. 325, 159 Mo. App. 277; *Burns v. Burns*, 82 N. E. 1107, 190 N. Y. 211, affirming 109 App. Div. 98, 95 N. Y. Supp. 797; *Williams v. Mutual Reserve Fund Life Ass'n*, 145 N. C. 128, 58 S. E. 802, 13 Ann. Cas. 51; *Eagle v. New York Life Ins. Co.*, 48 Ind. App. 284, 91 N. E. 814.

Nevertheless stipulations of that character must yield to considerations of public policy of the state when enforcement is sought.

Mutual Life Ins. Co. v. Mullen, 107 Md. 457, 69 Atl. 385. And see *Williams v. Mutual Reserve Fund Life Ass'n*, 58 S. E. 802, 145 N. C. 128, 13 Ann. Cas. 51.

A stipulation of that nature contained in the policy will not affect the general rules, in so far as a collateral agreement is concerned, as, for example, an assignment of the policy (*Russell v. Grigsby*, 168 Fed. 577, 94 C. C. A. 61). Conversely a stipulation of that nature, contained in a subsidiary agreement relating to the privilege of borrowing money on the policy, will not affect the original contract of insurance (*Head v. New York Life Ins. Co.*, 241 Mo. 403, 147 S. W. 827; *Id.*, 241 Mo. 420, 147 S. W. 832).

567. (k) Questions of practice

567 (k). An allegation that the policy sued on was issued in New Jersey is not an allegation that it is a New Jersey contract and subject to the laws of that state (*Prudential Life Ins. Co. v. Fusco's Adm'r*, 145 Ky. 378, 140 S. W. 566).

3. LIMITATIONS ON THE POWERS OF INSURERS

568-570. (a) General limitations

568 (a). The Iowa statute (McClain's Code, § 1695) authorizes domestic insurance companies to insure houses, buildings, and all other kinds of property against loss or damage by fire or "other casualty." Acts 28th Gen. Assem. c. 60, p. 44, amended the statute in relation to insurance companies, by expressly authorizing insurance against burglary, and McClain's Code, § 1685, provides that an insurance company as a condition precedent to doing business shall make a certain certificate as to the company's capital, business to be done, etc., which the State Auditor shall submit to the attorney general, on whose approval thereof the company may commence business. It was held that under section 1695, and in view of the fact that prior to Acts 28th Gen. Assem. c. 60, p. 44, the Auditor had authorized a company to write burglary insurance, and that the right to do such business had not been challenged for 10 years, the writing of burglary insurance by the company prior to the latter statute would not have been held unauthorized (*Bankers' Mut. Casualty Co. v. First Nat. Bank*, 108 N. W. 1046, 131 Iowa, 456).

Insurance against liability for damages caused by automobiles is not insurance on automobiles within Pub. Acts Mich. 1869, No. 136, as amended by Pub. Acts 1911, No. 15, § 1, authorizing corporations to insure automobiles; and hence a company organized thereunder cannot write such insurance (*American Automobile Ins. Co. v. Palmer*, 174 Mich. 295, 140 N. W. 557).

570-572. (b) Same—Mutual companies

572 (b). It has been held in Michigan that, under the statute of that state (Comp. Laws, § 7256) prohibiting a mutual insurance company from doing business on the stock plan, cash premium stock plan policies issued by a mutual fire insurance company containing no assessment liability clause were void (*Ely v. Oakland Circuit Judge*, 127 N. W. 769, 162 Mich. 466, modifying order 162 Mich. 466, 125 N. W. 375, on rehearing).

A mutual fire insurance company organized under Laws Neb. 1897, p. 257, c. 45, is not authorized to transact reinsurance business (*Allison v. Fidelity Mut. Fire Ins. Co.*, 81 Neb. 494, 116 N. W. 274, 129 Am. St. Rep. 694). On the other hand, it has been

held in Missouri that a mutual insurance company organized under Sess. Acts 1895, p. 200, for the purpose of insuring property of its members, may reinsure another company organized under the same act and operating on the same plan, without violating Rev. St. 1889, § 5875, forbidding such an insurance company from doing business on any other plan than that on which it is organized, when the reinsurance was made on the same plan as the original insurance (*Cass County v. Mercantile Town Mut. Ins. Co.*, 86 S. W. 237, 188 Mo. 1).

573-575. (d) Limitations as to character of property and extent of interest therein

574 (d). The Oklahoma statute (Sess. Laws 1899, p. 176, art. 1, § 5), providing that an association may insure grain, growing wheat, rye, barley, and "other crops," authorizes insurance of growing cotton (*State Mut. Ins. Co. v. Clevenger*, 87 Pac. 583, 17 Okl. 49; *Same v. Roark*, 87 Pac. 584, 17 Okl. 48). The by-law of insurance company, providing that buildings on which stovepipe runs through the roof or side of the house are not insurable, is binding on the members of the company (*Swett v. Antelope County Farmers' Mut. Ins. Co.*, 91 Neb. 561, 136 N. W. 347). A policy of township mutual fire insurance company, authorized by Gen. Laws Minn. 1915, c. 107, and not forbidden by its articles of incorporation, covering thresher on or off premises, was not ultra vires because a by-law limited insurance to threshers in store (*Trost v. Delaware Farmers' Mut. Fire Ins. Co.*, 137 Minn. 208, 163 N. W. 290).

575-576. (e) Limitations as to amount of insurance

576 (e). As the New York Insurance Law (Laws 1892, p. 1941, c. 690) § 24, as amended by Laws 1906, p. 768, c. 326, § 7, while providing that no single risk shall be taken by a guaranty company to an amount exceeding 10 per cent. of its stock and surplus, also provides that the part of such risk reinsured shall not be included in determining the limitation, a contract to furnish bonds in excess of such limit was not invalid, as beyond the company's authority, even though it did not expressly provide for reinsurance in part, as the company was bound to comply with the contract, if possible under the law (*Mosier v. United States Fidelity & Guaranty Co.*, 119 N. Y. Supp. 157, 134 App. Div. 849, judgment affirmed 202 N. Y. 521, 95 N. E. 1134).

Rev. St. Mo. 1909, § 7023, prohibiting insurers from requiring insured to become a coinsurer on the property covered, does not affect section 7030, prohibiting issuance of fire policies for more than three-fourths of the value of the property (*Surface v. Northwestern Nat. Ins. Co.*, 157 Mo. App. 570, 139 S. W. 262). The Missouri statute (Rev. St. 1909, § 7030), limiting the ratio of value at which property may be insured, construed with the title of the act which has reference to fire insurance alone, does not apply to tornado insurance (*Nalley v. Home Ins. Co.*, 157 S. W. 769, 250 Mo. 452, Ann. Cas. 1915A, 283).

The North Carolina statute (Revisal 1908, § 4773a) providing that no insurance company shall sell any policy granting insurance in an amount less than \$500 until the forms have been approved by the insurance commissioner, is a restriction on the insurance company and not on the contract, and does not invalidate a policy for less than that amount (*Blount v. Royal Fraternal Ass'n*, 79 S. E. 299, 163 N. C. 167).

576-577. (f) Life and accident companies

576 (f). A contract of insurance outside the object of the creation of the society and beyond the powers conferred upon it by the state of its organization is wholly void (*McCann v. Ladies of Macabees of the World*, 182 Ill. App. 319). A contract of pure endowment, by which defendant agreed to pay testator \$5,000 in case he was alive March 18, 1910, though not a contract of insurance, as defined by the insurance law was a valid contract which an insurance company is not prohibited from making (*Curtis v. New York Life Ins. Co.*, 104 N. E. 553, 217 Mass. 47, Ann. Cas. 1915C, 945). The Massachusetts statute (St. 1907, p. 858, c. 576) regulating insurance, by section 32 authorizes the formation of insurance companies to engage in insurance of any one of twelve different classes, and section 34 (page 860) declares that neither domestic nor foreign companies, with certain specified exceptions, shall transact more than one kind or class of insurance, one of the exceptions being that life insurance companies with a certain amount of paid-up capital may issue health or accident insurance, and declares that contracts for each of the classes specified in section 32 should be in separate and distinct policies. It has been held that life insurance companies authorized to issue both life, accident, and health insurance were not entitled to join two or more of such classes of insur-

ance in the same policy (*Ætna Life Ins. Co. v. Hardison*, 85 N. E. 407, 199 Mass. 181). And in the same case it was held that where life insurance policies recited that after one full annual premium had been paid, in case of impairment of health by bodily injury or disease, such as to prevent the insured from pursuing any gainful occupation, an additional provision might be made for him in different ways, viz., by paying insured an annuity and by paying the premiums on the policy during disability, etc., such provisions for health and accident insurance could not be regarded as subsidiary only to the life insurance feature, and that the policy was therefore in violation of the statute. But an industrial policy providing that one-half of the insurance should be payable if death should occur within six months from the date of the policy, but that, in the event of the death of the insured from accident within six months from date, the full amount should be paid, does not provide for accident insurance, and hence is not invalid, under St. 1907, c. 576, § 34, whereby accident insurance must be written in a separate and distinct policy (*Metropolitan Life Ins. Co. v. Hardison*, 94 N. E. 477, 208 Mass. 386).

A New Jersey statute (P. L. 1902, p. 407, as amended by P. L. 1907, p. 127) forbids the inclusion of life insurance and insurance against bodily injury or death by accident in the same policy. In *Travelers' Ins. Co. v. Watkins* (*Ætna Life Ins. Co. v. Same*) 77 N. J. Law, 223, 71 Atl. 325, it was held that a policy containing besides the usual life insurance contract a provision that in the event of bodily injury to insured causing permanent total disability to perform any work or follow any occupation, or in the event of loss by accident of eyesight, hands, or feet, the insured in lieu of continuing the policy, may, at his option, receive in his lifetime its face value in 20 annual installments, or a life annuity of a stipulated amount to be ascertained by a table embodied in the policy, is in violation of the statute.

The Ohio statute (Rev. St. 1908, § 289, as amended by Act April 9, 1908, 99 Ohio Laws, p. 131), making it unlawful to issue contracts of insurance for the payment of funeral, burial, or other expenses, in such form as to deprive the representative of the family of a decedent from purchasing such supplies, etc., was a substantial exercise of the state's right to control the business of insurance (*Robbins v. Hennessey*, 99 N. E. 319/86 Ohio St. 181).

If the charter of an insurance company authorizes it to issue different kinds of policies, it may discontinue the writing of assess-

ment insurance as against an assessment policy holder whose policy contained nothing requiring the company to continue writing such insurance (*Green v. Hartford Life Ins. Co.*, 51 S. E. 887, 139 N. C. 309, 1 L. R. A. [N. S.] 623, 4 Ann. Cas. 360).

577 (f). Limitations and restrictions affecting the amount of insurance that may be written in a policy of life or accident insurance are contained in the statutes of some states. A Missouri statute (Rev. St. 1899, § 7903) declares that every certificate issued by any assessment insurance organization promising a payment to be made upon a contingency of death, sickness, disability, or accident, shall specify the exact sum of money which it promises to pay, etc. The by-laws of such an organization provided that indemnity for sickness should only be paid to the member himself, and that in case of his death before payment the indemnity should revert to the association, which should be only liable for funeral benefits; and another provision declared that the association should in no event be liable for both weekly indemnity and funeral benefits, but the policy provided for a fixed payment per month for disability through sickness, and declared that, after continuous membership for 12 months next prior to death, funeral expenses would be defrayed in a sum not exceeding \$100. It has been held that a further provision of the by-laws, to the effect that, where disability was the result of sickness, indemnity should not be paid for a greater period than 10 weeks, was not contrary to the terms of the policy, forbidden by the statute, or objectionable as uncertain and oppressive (*Courtney v. Fidelity Mut. Aid Ass'n*, 94 S. W. 768, 101 S. W. 1098, 120 Mo. App. 110).

A New York statute (Laws 1892, c. 690, § 55) declares that a policy on the life of a child under two years of age shall not be issued to an amount exceeding \$30. It was held in *O'Rourke v. John Hancock Mut. Life Ins. Co.*, 30 N. Y. Supp. 215, and in *Flynn v. Prudential Ins. Co.*, 145 App. Div. 704, 130 N. Y. Supp. 546, that the statute did not prohibit the issuing of several policies each for that amount. But the judgment in the *Flynn* case was reversed by the Court of Appeals (*Flynn v. Prudential Ins. Co.*, 207 N. Y. 315, 100 N. E. 794), and it was held that the effect of the statute was not only to limit the amount that may be covered by one policy, but to prohibit issuance of two or more policies aggregating more than that amount. In view of the statute, a provision in a life policy issued on an infant that if other policies of insurance were in force at the time of death the amount payable should not be greater than

the difference between the amount specified in a table and the total amount of all other policies by whomsoever issued applies to all policies issued on the life of the infant, regardless of whether the beneficiaries were the same (*Dolan v. John Hancock Mut. Life Ins. Co.*, 141 N. Y. Supp. 101).

The right of a life insurance company to reinsure its risks is not unrestricted. Thus in *Northwestern Nat. Life Ins. Co. v. Gray*, 161 Fed. 488, 88 C. C. A. 430, it was held that a contract of reinsurance between two life insurance companies, by which one transfers all of its assets to the other and ceases business, thus disabling itself from performing its executory contracts with its policy holders, while the other assumes such contracts on terms agreed upon, is not binding upon such policy holders, in whose favor a right of action at once arises against their own company for breach of contract. Such a policy holder is, however, put to his election, and if he accepts the reinsurance offered he is bound by the terms of the contract between the two companies.

The Indiana act of March 11, 1867 (Laws 1867, p. 150, c. 71), authorizing reinsurance of life insurance risks, is a general act applicable to life insurance companies generally, with which Act March 9, 1897 (Laws 1897, p. 381, c. 195), recognizing and limiting the exercise of such right, is consistent, so that both acts are to be construed together (*Federal Life Ins. Co. v. Kerr* [Ind. App.] 82 N. E. 943, 85 N. E. 796). It has also been held in Indiana (*Mutual Reserve Life Ins. Co. v. Ross*, 42 Ind. App. 621, 86 N. E. 506), that where, upon the transfer of insured's policy by the company in which he was originally insured to another company, the latter company notified him of the transfer, stating in the notice that the policy would be continued on the same terms, it will not be presumed, in an action on the policy, that the company did not have the power to insure him on the terms indicated.

577-578. (g) Limitations peculiar to mutual benefit associations

577 (g). The powers of fraternal benefit societies are to be ascertained from its charter, and those powers not specifically granted, and not necessarily implied from those specifically granted, are deemed to have been withheld.

McCartney v. Supreme Tent Knights of Maccabees of the World, 132 Ill. App. 15; *Cerny v. Jednota Cesky Dam*, 146 Ill. App. 518; *Same v. Sesterska Podporujici Jednota*, 146 Ill. App. 590.

A policy or certificate issued contrary to the rules of a locomotive

Protective Legion v. O'Brien, 112 N. W. 1050, 102 Minn. 15). And, applying this rule, it was said in the same case that a fraternal beneficiary association, executing a contract to pay dividends or maturity benefits to its living members not under disability, the incidents of which were to pay small disability benefits as a loan and an insignificant death benefit for a flat premium, is engaged in the sale of endowments prohibited by law. So, too, it has been held in Illinois that a fraternal benefit society has no power to agree to pay a member a specific sum upon his arriving at a specified age (McCartney v. Supreme Tent Knights of Maccabees of the World, 132 Ill. App. 15). In Guthrie v. Supreme Tent Knights of the Maccabees of the World, 4 Cal. App. 184, 87 Pac. 405, the facts were that the certificate of insurance provided for one assessment on the membership not exceeding \$2,000 as a benefit to his daughter on satisfactory proof of his death, and, in case of total or permanent disability "or on attaining the age of 70 years," he would be entitled to receive one-half of the endowment as provided by the laws of the order. It was held that such contract should be construed to entitle the insured to one-half of the endowment in case of permanent disability, of which the attaining the age of 70 years was to be conclusive proof, and, as so construed, the contract was within the charter powers of the society, which was authorized to make payment of monthly and weekly sums in case of disability, etc.

580-581. (j) Same—Power to reinsure

581 (j). A mutual benefit society organized under Kirby's Dig. Ark. § 937 et seq., could validly use a reserve fund created by by-law in procuring reinsurance of its policies in an independent stock company under a resolution adopted by the stockholders of the society, especially since the reinsurance contract had been executed by all but a few of the 13,000 policy holders, and the dissenting policy holders are permitted to receive a justly proportionate share of the reserve fund in lieu of reinsurance (Freemyer v. Industrial Mut. Indemnity Co., 101 Ark. 61, 141 S. W. 508).

**4. VALIDITY OF POLICY AND COLLATERAL CONTRACTS AS
AFFECTED BY FAILURE TO COMPLY WITH STATUTES
REGULATING INSURANCE COMPANIES**

581-582. (a) General principles

582 (a). In view of the fundamental principle that to be affected by the noncompliance of the company with the statutes regulating the business of insurance, the contract must pertain to the insurance business, a foreign insurance company which has not received a permit authorizing it to transact business in the state, as required by Code Iowa, § 1637, may sue in the courts of the state on a note and mortgage received in consideration of a loan made by it (*Prudential Ins. Co. v. Cushman*, 106 N. W. 934, 130 Iowa, 378).

583-584. (b) Validity of contracts based on doctrine of estoppel

583 (b). In some jurisdictions the validity of policies issued by foreign companies which have failed to comply with the statutes has been sustained on the ground of estoppel.

Sheets v. Iowa State Ins. Co., 153 Mo. App. 620, 135 S. W. 80; *Corbett v. Physicians' Casualty Ass'n of America*, 135 Wis. 505, 115 N. W. 365, 16 L. R. A. (N. S.) 177.

584 (b). The theory of the cases is that the statutes are for the protection of the insured (*Corbett v. Physicians' Casualty Ass'n*, 135 Wis. 505, 115 N. W. 365, 16 L. R. A. [N. S.] 177), and the parties are not in *pari delicto* (*Latham Mercantile & Commercial Co. v. Harrod*, 71 Kan. 565, 81 Pac. 214).

586-587. (d) Validity of contracts when statute does not expressly declare them void

586 (d). It seems to be settled that a foreign insurance company, which has not complied with the statutes of the state regulating such companies, cannot enforce against the insured its claim for premiums.

Swing v. Weston Lumber Co., 103 N. W. 816, 140 Mich. 344; *Swing v. Cameron*, 108 N. W. 506, 145 Mich. 175, 9 L. R. A. (N. S.) 417, 9 Ann. Cas. 332; *Bankers' Casualty Co. v. Richland County Banking Co.*, 31 Ohio Cir. Ct. R. 428; *Presbyterian Ministers' Fund v. Thomas*, 126 Wis. 281, 105 N. W. 801, 110 Am. St. Rep. 919.

The policy issued by a foreign company which has not complied with the statutes regulating such companies will not on that account be declared void as to the insured in the absence of an express statute to that effect.

Strampe v. Minnesota Farmers' Mut. Ins. Co., 123 N. W. 1083, 109 Minn. 364, 26 L. R. A. (N. S.) 999, 134 Am. St. Rep. 781; *Reisser v. Same*, 123 N. W. 1085, 109 Minn. 527; *Willert v. Same*, 123 N. W. 1085, 109 Minn. 527; *Bjorke v. Same*, 123 N. W. 1085, 109 Minn. 528; *Holland v. Same*, 123 N. W. 1085, 109 Minn. 528; *Morgan v. Royal Ben. Society*, 170 N. C. 75, 86 S. E. 975; *Smith v. State*, 134 N. W. 1123, 149 Wis. 63.

Similarly it has been held in New Jersey that though the scheme of a railroad organizing an association for the benefit of its employes to establish a fund to pay death benefits is violative of the general insurance law, it does not affect the contract between the railroad and an employe, but the contract, in the absence of legislation on the subject, is enforceable (*Wolfstern v. Pennsylvania Railroad Voluntary Relief Department*, 76 N. J. Eq. 78, 74 Atl. 533).

588-590. (f) Contrary doctrine—Contracts void when business is prohibited and penalty provided

588 (f). In a few states it has been held that, where the statute prohibits a foreign company from transacting any insurance business in the state unless it has complied with the requirements of the statute, policies issued by such company are void.

Swing v. Sligo Furnace Co., 133 Ill. App. 217; *Swing v. Wanamaker*, 139 App. Div. 627, 124 N. Y. Supp. 231; *Swing v. Dayton*, 124 App. Div. 58, 108 N. Y. Supp. 155, affirmed in 89 N. E. 1113, 196 N. Y. 503; *Woolwine v. Mason*, 128 Tenn. 35, 157 S. W. 682.

Moreover, if the company issues a policy prior to its being authorized to do business in the state, its subsequent compliance with the statute does not operate to render the policy valid and enforceable (*Swing v. Thomas*, 120 Ill. App. 235).

591-593. (h) Validity as dependent on place of contract

591 (h). If the contract is invalid in the state where made by reason of the failure of the company to comply with the statutes of such state, it will not be enforced in any other state.

Swing v. Wanamaker, 124 N. Y. Supp. 231, 139 App. Div. 627; *Presbyterian Ministers' Fund v. Thomas*, 105 N. W. 801, 126 Wis. 281, 110 Am. St. Rep. 919.

592. (h). In some jurisdictions it has been held that, if the contract made in another state covers property in a state, the statute of which has not been complied with, it will nevertheless be enforced in that state, if it is a valid contract in the state where it was made.

Massachusetts Bonding & Ins. Co. v. Home Life & Accident Co., 119 Ark. 102, 178 S. W. 314; *Stone v. Old Colony St. Ry. Co.*, 99 N. E. 218, 212 Mass. 459; *Swing v. B. E. Brister & Co.*, 40 South. 146, 87 Miss. 516, 6 Ann. Cas. 740; *Globe & Rutgers Fire Ins. Co. of New York v. David Moffat Co.*, 154 Fed. 13, 83 C. C. A. 91.

On the other hand, in other jurisdictions the courts have held that the principle of comity does not extend to such cases, and have refused to sustain a contract covering property within the state, made by a company not complying with the statute, though the contract was made in another state and valid there (*Swing v. Thomas*, 120 Ill. App. 235).

In *Owen v. Bankers' Life Ins. Co.*, 84 S. C. 253, 66 S. E. 290, 137 Am. St. Rep. 845, a life insurance contract was involved, and it was held that under the South Carolina statute (Civ. Code 1902, §§ 1787, 1790), providing that the taking by a foreign insurance company from any citizen of the state of any premium on any policy shall constitute the doing of business within the state, and that the place of the making and of the performance of the contract shall be deemed to be within the state, and that all foreign corporations doing business in the state will be subject to the laws thereof, etc., a policy issued by a foreign insurance company to a citizen of South Carolina is a South Carolina contract and governed by its laws.

593-594. (i) Questions of practice

593 (i). In an action by the receiver of a mutual insurance company to recover an assessment on the policy, the defense that the contract is unenforceable because the company had failed to procure any permit to do business in this state is available under the general denial (*Swing v. Cameron*, 108 N. W. 506, 145 Mich. 175, 9 L. R. A. [N. S.] 417, 9 Ann. Cas. 332). A foreign life insurance association, when sued on a certificate issued by it, in order to receive the benefit of the laws and rules of construction pertaining to death benefit certificates issued by fraternal benefit associations, must plead and prove not only that it possesses the essential qualifications of such a society, as prescribed in Rev. St. 1899, § 1408,

but also that it has been admitted to do business in this state in the manner provided by Rev. St. 1899, § 1410 (*Gruwell v. National Council of Knights and Ladies of Security*, 104 S. W. 884, 126 Mo. App. 496).

6. ESTOPPEL AND WAIVER AS TO DEFECTS AND OBJECTIONS IN GENERAL

607-608. (a) In general

607 (a). If an application for life insurance is signed by the beneficiary, and not by the applicant, and the officers of the association, with full knowledge of the irregularity in the signature, issue a policy of insurance on the application, the company will thereafter be estopped from denying the validity of the policy on the ground of the irregularity in the signature (*Corrigan v. Cambridge Mut. Beneficial Ass'n*, 33 Pa. Super. Ct. 17). So, too, the insurer may be estopped to claim that no application was made for the policy sued on, so that it was not a binding contract (*Amarillo Nat. Life Ins. Co. v. Brown* [Tex. Civ. App.] 166 S. W. 658).

Delivery of a policy or benefit certificate as a completed instrument estops the insurer to assert irregularities in the contract.

Fowler v. Title Guaranty & Surety Co., 129 Pac. 171, 88 Kan. 455; *Sovereign Camp of Woodmen of the World v. Jackson* (Okla.) 157 Pac. 92, L. R. A. 1916F, 166; *Curran v. National Life Ins. Co. of United States*, 96 Atl. 1041, 251 Pa. 420; *Independent Order of Foresters v. Cunningham*, 127 Tenn. 521, 156 S. W. 192; *Prosser Power Co. v. United States Fidelity & Guaranty Co.*, 73 Wash. 304, 132 Pac. 48.

Although a surety bond to indemnify an employer against any pecuniary loss sustained by default of a clerk provided that it should be of no effect unless signed by the employé, where the agents of the bonding company to whom the application for the bond was made and who caused the bond to be executed and delivered to the employer knew that it had not been signed by the employé and delivered it without such signature with a letter stating that it was "duly executed," it will be presumed that they intended to waive the condition requiring the signature (*General Ry. Signal Co. v. Title Guaranty & Surety Co.*, 96 N. E. 734, 203 N. Y. 407, affirming judgment 123 N. Y. Supp. 1117, 139 App. Div. 925). So, too, a company, having issued and delivered a policy, and known of

the destruction of the property when the loss was adjusted, and accepted proof of loss and participated in an adjustment which proceeded on the theory of it and other policies being valid, and issued its check for its share, admitted liability, and so was estopped to assert that there had been, without its knowledge, a refusal to accept the policy, so that it was not in force (*Finley v. Western Empire Ins. Co. of Washington*, 125 Pac. 1012, 69 Wash. 673). If a fire insurance company has the opportunity and ability to ascertain a mistake in the description of the insured property, it cannot rely upon such mistake as an equitable defense to an action on the policy (*Citizens' Mut. Fire Ins. Co. of Cecil County v. Conowingo Bridge Co.*, 82 Atl. 372, 116 Md. 422). Where a health and accident policy, providing that should there be only one person over 18 and under 60 years named as beneficiary the policy should insure such person, was renewed after the beneficiary reached 60, the provision as to age was waived (*Cook v. National Fidelity & Casualty Co.*, 100 Neb. 641, 160 N. W. 957). An insurer, joining with insured in the appointment of appraisers, as required by a policy declaring that such appraisal shall affect no other question under the policy, does not waive his right to object to the validity of the policy, on the ground that the agent issuing it was a stockholder of the corporation owning the property (*Riverside Development Co. v. Hartford Fire Ins. Co.*, 105 Miss. 184, 62 South. 169, Ann. Cas. 1916D, 1274).

Where a state agent of a fraternal benefit association offered to refund the initiation fee paid by a person to whom a certificate had been issued but not delivered with a view to the formation of a new lodge, but the beneficiary refused to accept it, and brought suit 36 days after the death of the person dying before initiation, there was no waiver of the right to insist on an initiation. *Porter v. Loyal Americans of the Republic*, 167 S. W. 578, 180 Mo. App. 538.

As a waiver cannot exist, unless there was knowledge of the defect, it was held in *Wilcock v. Massachusetts Bonding & Ins. Co.*, 112 N. E. 81, 223 Mass. 482, that the requirement that the employé sign a fidelity bond is not waived, where none of the officers of the surety company authorized to waive knew that it was not signed.

Where the insurer in a fire policy ascertained that its agent at the time of writing the policy was also the agent of the insured, if it desired to avoid the policy, it was its duty to manifest such intention promptly. *German Ins. Co. v. Gibbs, Wilson & Co.*, 92

S. W. 1068, 42 Tex. Civ. App. 407, rehearing denied 96 S. W. 760, 42 Tex. Civ. App. 407.

An insurance company may, by custom and course of dealing be estopped to rely on defects or objections. Thus where, in an action on a policy on certain cotton gin risks written by defendant's local agents, defendant claimed that the local agents had no authority to write such risks, but were required to submit them to defendant's general agents, evidence that on a previous occasion the local agents had forwarded an application for a gin risk to the general agents, which was returned with instructions to issue the policy themselves, and that thereafter, shortly before and after writing the policy in question, such local agents wrote gin risks and daily reported the same to the general agents, was admissible to show the local agents' authority (*St. Paul Fire & Marine Ins. Co. v. Stogner*, 44 Tex. Civ. App. 60, 98 S. W. 218).

608-610. (b) Estoppel by acts of agents or officers

608 (b). An insurer is estopped to assert the invalidity of a policy when such invalidity is due to the fraudulent conduct of its own agent (*Pirring v. Supreme Council of Catholic Mut. Ben. Ass'n*, 104 App. Div. 571, 93 N. Y. Supp. 575); though of course the rule will not be applied when there is a fraudulent collusion between the agent and the insured (*Elliott v. Knights of the Modern Maccabees*, 46 Wash. 320, 89 Pac. 929, 13 L. R. A. [N. S.] 856).

609 (b). So, too, the negligence of the agent may operate to estop the insurer, if combined with other facts which make it inequitable to assert the objection (*Stewart v. Glade Mill Mut. Fire Ins. Co.*, 41 Pa. Super. Ct. 472). Thus, where the description of the property insured as contained in the policy was written by the agent of the company without suggestion from the insured, the company may not complain of the terms thereof (*American Ins. Co. v. Egyptian Lodge No. 802, I. O. O. F.*, 128 Ill. App. 161). Similarly it was held that, where the secretary of an insurance company when he wrote a policy knew that the children of the insured were the owners of the property insured, subject to the homestead and dower right of the insured, the provision in the policy making it void if property insured is not insured in the names of all the owners, the names of which must be stated in the application was waived (*Siemers v. Meeme Mut. Home Protection Ins. Co.*, 143 Wis. 114, 126 N. W. 669, 139 Am. St. Rep. 1083). But no estoppel (186)

can arise either from an insurance company's failure to act upon and formally reject an application, or from the failure of the company's soliciting agent to forward the application to the company, where, before either of these things can be done, the property is totally destroyed by fire, and the soliciting agent immediately tenders to the applicant the policy fee he had paid (*Ripka v. Mutual Fire Ins. Co. of Annville*, 36 Pa. Super. Ct. 517).

In *Kimbrow v. New York Life Ins. Co.*, 134 Iowa, 84, 108 N. W. 1025, 12 L. R. A. (N. S.) 421, the facts were these: Insured made application through insurer's local agent, giving him a note for the premium, and the insurer sent the agent a policy other than that applied for, directing the agent to submit it to insured for acceptance, and authorizing the agent to deliver it only on condition that insured execute an amended application. The agent wrote the insured that his policy had arrived, and that he would deliver it on the day the note was due. Before maturity of the note, and before acquiring any knowledge of the facts, the insured died. It was held that the insurer was liable on the policy applied for under the principle of estoppel. On the other hand, in *McNicol v. New York Life Ins. Co.*, 149 Fed. 141, 79 C. C. A. 11, under somewhat similar facts, it was held that there was no estoppel. In that case it appeared that the defendant company rejected an application for insurance as made, but filled out an amended application and the policy based thereon, and sent the same to its local agent, with instructions not to deliver the policy until insured had signed the amended application and paid the necessary additional premium. The agent wrote the applicant that he had received the policy "straight as a string" and hoped to deliver the same the following Sunday, but the applicant died before signing the amended application or obtaining the policy. It was held that the insurance company was not estopped by the letter of the local agent to deny that it had not accepted the applicant's original proposition.

In *Shartle v. Modern Brotherhood of America*, 139 Mo. App. 433, 122 S. W. 1139, it was said that a fraternal benefit association may be estopped to deny liability, notwithstanding noncompliance by a member with the by-laws as to the requisites of liability, if its supreme officers led deceased to believe that it had assumed liability without such compliance, or by such conduct of its subordinate officials continued so long that it must have necessarily become known to the supreme officials. But the court said, further, that

the member could not be misled by the nonenforcement of the by-laws as to matters essential to constitute membership so as to estop the society from denying liability on the certificate for noncompliance with such by-laws, where he did not know of their nonenforcement.

Where the by-laws of a fraternal benefit society, which were expressly declared to be a part of the contract of insurance, made the initiation of a candidate a condition precedent to membership, and provided that the certificate should not be delivered until after initiation, and that no officer of the society or of the local camp was authorized or permitted to waive any provisions of the by-laws, the act of officers of the local camp in agreeing to deliver a certificate before initiation, and causing it to be done, was beyond the scope of the authority of the officers, to the knowledge of the holder of the certificate, and his beneficiary could not base a waiver thereon (*Loyd v. Modern Woodmen of America*, 87 S. W. 530, 113 Mo. App. 19). And where the by-laws of a mutual benefit society provided that no officer or local camp was authorized to waive any of the provisions relating to the contract between a member and the society, and further prescribed that no person should become a member until duly adopted by his local camp, etc., the deputy head consul of the society, authorized to obtain new members and to organize local camps, had no authority to waive such by-laws (*McWilliams v. Modern Woodmen of America* [Tex. Civ. App.] 142 S. W. 641). So, too, the statement of the clerk of a local camp of a fraternal insurance order that, if a beneficiary in a certificate issued to her son would pay a part of the loss to her daughter-in-law, the certificate would be allowed, did not operate as a waiver of by-laws of the order fixing its liability, especially where they were not acted on by the beneficiary, who did not incur any expense in reliance thereon, though the clerk had authority to waive by-laws (*Larkin v. Modern Woodmen of America*, 163 Mich. 670, 127 N. W. 786).

Where the by-laws of an insurance order provided that the certificate should be kept by the association, the failure of the order to surrender a certificate to the beneficiary on the death of the member did not operate as a waiver of objections to liability on the certificate, especially where the counsel for the beneficiary was given the right to inspect the certificate at any time (*Knights of Macca-bees of the World v. Hunter*, 103 Tex. 612, 132 S. W. 116).

610-611. (c) Estoppel by receiving and retaining premium

610 (c). An insurer, by accepting and retaining the premium on a contract of insurance, is estopped to object thereto on the ground of defects or irregularities (*Wheaton v. Liverpool & London & Globe Ins. Co.*, 20 S. D. 62, 104 N. W. 850). So where a bonding company, with knowledge of an informality in the execution of a bond by its agent, receives and retains the premium, it is estopped in an action on the bond from urging such informality as a defense (*Farmers' & Merchants' Irr. Co. v. United States Fidelity & Guaranty Co.*, 77 Neb. 144, 108 N. W. 156). But it has been held in Indiana that the fact that the company retained the premium paid by applicant for insurance on a stallion and informed him that his application had not been rejected, did not estop insurer to deny that contract was made, since applicant was not misled (*Live Stock Ins. Ass'n of Huntington, Wabash and Whitley Counties v. Stickler* [Ind. App.] 115 N. E. 691).

The rule that acceptance and retention of premiums operates as an estoppel is also applicable to life and accident policies.

Security Mut. Life Ins. Co. v. Miller, 106 N. W. 229, 75 Neb. 257;
Pender v. North State Life Ins. Co., 79 S. E. 293, 163 N. C. 98;
American Bankers' Ins. Co. v. Thomas (Okla.) 154 Pac. 44; *Fisher v. Travelers' Ins. Co.*, 124 Tenn. 450, 138 S. W. 316, Ann. Cas. 1912D, 1246; *Mutual Life Ins. Co. v. Summers*, 19 Wyo. 441, 120 Pac. 185.

So, too, a mutual benefit society may be estopped to object to defects and irregularities in the contract with a member by accepting and retaining dues and assessments.

O'Neal v. Sovereign Woodmen of The World, 130 Ky. 68, 113 S. W. 52; *Stronge v. Supreme Lodge, K. P.*, 82 N. E. 433, 189 N. Y. 346, 12 L. R. A. (N. S.) 1206, 121 Am. St. Rep. 902, 12 Ann. Cas. 941, reversing 111 App. Div. 87, 97 N. Y. Supp. 661; *Frank v. Switchmen's Union of North America*, 87 Wash. 634, 152 Pac. 512.

But the right to make the defense that an applicant for membership in a fraternal benefit association had died before becoming a member was not waived or lost because of a failure of the subordinate commandery to return the assessment paid by the applicant for the benefit fund (*Patterson v. Supreme Commandery United Order of Golden Cross of the World*, 71 Atl. 1016, 104 Me. 355). So, too, a fraternal beneficiary association, receiving dues from a member never initiated, as required by the by-laws, did not waive

the right to rely on the by-laws; where it tendered back the dues immediately on discovering the mistake (*Kolosinski v. Modern Brotherhood of America*, 175 Mich. 684, 141 N. W. 589). And the acceptance and retention of dues and assessments will not operate as a waiver if the association is at the time ignorant of the defect.

Louden v. Modern Brotherhood of America, 107 Minn. 12, 119 N. W. 425; *Driscoll v. Modern Brotherhood of America*, 77 Neb. 282, 109 N. W. 158.

In *Gutkowsky v. Grand Lodge Progressive Order of the West*, 194 Ill. App. 452, it was held that a subordinate lodge has no power to waive a requirement of the constitution and by-laws of the Grand Lodge, making the approval of the latter body of an applicant's medical certificate a prerequisite to membership, and hence the retention by a subordinate lodge of the dues of an applicant for three months does not constitute a payment to the Grand Lodge so as to estop that body from denying liability on a benefit certificate on the ground of the nonapproval by it of the applicant's medical certificate.

611-612. (d) Ratification by insurer

611 (d). A policy defective in some particular may of course be ratified by positive acts. Thus the execution and issuance of a vacancy permit to be attached to and form part of a policy operates as a ratification of the policy which was defective in that it was not signed (*Delaware Ins. Co. v. Pennsylvania Fire Ins. Co.*, 126 Ga. 380, 55 S. E. 330, 7 Ann. Cas. 1134). Though a policy is substituted by unauthorized agent, his act may be subsequently ratified by his principal (*Hollywood Lumber & Coal Co. v. Dubuque Fire & Marine Ins. Co.* [W. Va.] 92 S. E. 858).

612 (d): So, too, ratification may be presumed from silence or failure to object with knowledge of the facts upon which objection could be based (*German Ins. Co. v. Gibbs, Wilson & Co.*, 42 Tex. Civ. App. 407, 92 S. W. 1068, rehearing denied 42 Tex. Civ. App. 407, 96 S. W. 760). And the unimproved opportunity of officers of an insurer to inform themselves of the facts is equivalent to knowledge (*Cranston v. West Coast Life Ins. Co.*, 72 Or. 116, 142 Pac. 762). So where one, assuming to act as an insurance agent, receives an application for insurance, and the company with knowledge of such assumption issues a policy and receives the premium thereon, intending that the policy shall be received in accordance

with the application, the act of the agent in soliciting and receiving the application is the act of the company (*Staats v. Pioneer Ins. Ass'n*, 55 Wash. 51, 104 Pac. 185). But where a policy was obtained for a corporation by its acting president without authority, and certain adjusters without authority from the corporation gave notice to the insurer of loss, the insurer's statement that its Southern manager would adjust the loss, in the absence of knowledge of the facts, did not constitute a recognition of the policy on its part (*Marqusee v. Insurance Co. of North America*, 211 Fed. 903, 128 C. C. A. 281). And an insurance company, having no knowledge until after a loss that the property insured by a policy issued by its agent was owned by a corporation of which he was a stockholder, did not ratify the act of the agent by making no objection to the report of the agent that the policy was issued, made shortly after its issuance (*Riverside Development Co. v. Hartford Fire Ins. Co.*, 105 Miss. 184, 62 South. 169, Ann. Cas. 1916D, 1274).

An insurance company cannot accept the part of an unauthorized contract made by an agent which was favorable to it and reject the rest, but must ratify it as a whole (*Shook v. Retail Hardware Mut. Fire Ins. Co. of Minnesota*, 154 Mo. App. 394, 134 S. W. 589).

612-614. (e) Estoppel of insured

612 (e). The insured may be estopped to object to the contract because of defects or irregularities by paying premiums thereon with knowledge of such defects (*McNaught v. Equitable Life Assur. Society*, 136 App. Div. 774, 121 N. Y. Supp. 447), or even by failure to repudiate the contract within a reasonable time.

Gray v. Stone, 102 Ark. 146, 143 S. W. 114; *Franklin Life Ins. Co. v. Boykin*, 10 Ga. App. 345, 73 S. E. 545.

However, an insured is not estopped from asserting that a life policy was procured by misrepresentations, where he declined to accept a policy written so as to mature differently from the time represented, and received possession of it solely to deliver it to the company's adjuster (*Stengel v. Colorado Nat. Life Assur. Co.* [Tex. Civ. App.] 147 S. W. 1193).

613 (e). By bringing suit against the reinsurer, a policy holder ratifies and adopts the contract of reinsurance so far only as it was authorized by law (*Federal Life Ins. Co. v. Kerr* [Ind. App.] 82 N. E. 943).

614 (e). A member of a mutual benefit association ratifies a by-law reducing the amount of his certificate by paying assessments on the reduced amount (*Attorney General v. Supreme Council, American Legion of Honor*, 207 Mass. 586, 93 N. E. 797). So, too, it has been held in *Attorney General v. Supreme Council, A. L. H.*, 206 Mass. 183, 92 N. E. 147, involving the same by-law that the act of a member in continuing to pay or to tender payment to the corporation of assessments on the basis of the original certificate, after the corporation had adopted a by-law reducing certificates, was a sufficient protest against the reduction to preserve his rights under the original certificate. But it has also been held that a protest to the collector of the local council or lodge of which one is a member is not a protest to the corporation, so as to preserve rights under the original certificate.

Attorney General v. Supreme Council, A. L. H., 206 Mass. 180, 92 N. E. 145; *Attorney General v. Supreme Council, A. L. H.*, 206 Mass. 175, 92 N. E. 143.

A member of a fraternal beneficiary corporation conducting business on the lodge system, who tendered to the local collector the full assessments on his certificate after the corporation had attempted to reduce the same pursuant to a by-law reducing all certificates, did not thereby preserve his rights under the original certificate. *Attorney General v. Supreme Council, A. L. H.*, 92 N. E. 150, 206 Mass. 190.

On the other hand, a by-law of a fraternal life insurance company deducting 10 per cent. from the sum for which insured was originally insured was assented to by him by afterwards changing the beneficiary under the policy and making the certificate payable to the new beneficiary in the amount as changed by the by-law (*Jaeger v. Grand Lodge of Order of Hermann's Sons*, 135 N. W. 869, 149 Wis. 354, 39 L. R. A. [N. S.] 494). So, too, a member ratified an amendment of the constitution of a benefit association increasing his assessments and creating a lien on the certificate, thereby reducing the amount payable thereunder, by paying assessments with knowledge of the amendment and without protest (*Fort v. Iowa Legion of Honor*, 146 Iowa, 183, 123 N. W. 224). By seeking to excuse nonpayment of an increased assessment on ground that change in defendants' constitution operated as renunciation of contract, plaintiffs are not estopped to assert that changes were not lawfully made, or that it did not have notice of them (*Gibson v. Iowa Legion of Honor [Iowa]* 159 N. W. 639).

Where a member of a mutual benefit association on its change from the assessment to the monthly payment plan surrendered his certificate for another and made payments under the new plan, he thereby consented to the change (*Supreme Ruling of Fraternal Mystic Circle v. Ericson* [Tex. Civ. App.] 131 S. W. 92). But the payment of assessments by member of a benefit insurance society is not a consent to a change in the rules, where he had refused to surrender his old certificate and accept a new one under the new rules (*Stirn v. Supreme Lodge of Bohemian Slavonian Benev. Society*, 150 Wis. 13, 136 N. W. 164). The fact that insured paid assessments made under an invalid amendment to the by-laws, increasing the rate of assessment contrary to the terms of the certificate, under a threat to forfeit the certificate unless they were paid, did not entitle the company to further amend its by-laws, so as to impose illegal assessments, or estop him from denying the validity of both amendments, in so far as they affected his original contract (*Rockwell v. Knights Templars & Masonic Mut. Aid Ass'n*, 119 N. Y. Supp. 515, 134 App. Div. 736).

614-618. (f) Same—As to form and contents of policy

615 (f). It is a general rule that, as the insured is bound to take notice of the terms of his contract as contained in the policy, his retention of the policy without objection, in the absence of fraud, raises the presumption of knowledge of its terms and estops him from afterwards making objection.

Metropolitan Life Ins. Co. v. Goodman, 65 South. 449, 10 Ala. App. 446; *Miller v. Home Ins. Co. of New York*, 96 Atl. 267, 127 Md. 140; *Robertson v. Covenant Mut. Life Ins. Co.*, 100 S. W. 686, 123 Mo. App. 238; *Germania Life Ins. Co. v. Bouldin*, 100 Miss. 660, 56 South. 609; *Home Mut. Fire Ins. Co. v. Pittman*, 111 Miss. 420, 71 South. 739; *Danner v. Equitable Life Assur. Society of United States*, 141 N. Y. Supp. 442, 156 App. Div. 562; *Tilton v. Farmers' Ins. Co. of Town of Palatine*, 143 N. Y. Supp. 107, 82 Misc. Rep. 79; *Floars v. Aetna Life Ins. Co.*, 56 S. E. 915, 144 N. C. 232, 11 L. R. A. (N. S.) 357; *Brown v. Connecticut Fire Ins. Co. (Okl.)* 153 Pac. 173; *Wells v. Great Eastern Casualty Co. (R. I.)* 101 Atl. 6; *Great Eastern Casualty Co. v. Thomas* (Tex. Civ. App.) 178 S. W. 603; *Ribble v. Roberts* (Tex. Civ. App.) 180 S. W. 620; *United States Casualty Co. v. Charleston, S. C. Mining & Mfg. Co. (C. C.)* 183 Fed. 238. See, also, *Langdon v. Northwestern Mut. Life Ins. Co.*, 199 N. Y. 188, 92 N. E. 440, affirming 131 App. Div. 922, 115 N. Y. Supp. 1128.

In *Hardiman v. Fire Ass'n of Philadelphia*, 212 Pa. 383, 61 Atl. 990, the policy provided that it should be void if the building was vacant or unoccupied for 10 days. The company's agent, in affixing the revenue stamp, covered the provision that the policy should be so avoided "unless otherwise provided by agreement indorsed thereon." It was held that a claim that insured had no notice of the existence of the covenant as to vacancy of the premises could not be maintained, as he was put on inquiry as to the provisions of the policy.

616 (f). It has been held in some cases that an applicant for insurance is entitled to assume, in the absence of evidence, that the agent has prepared his application according to the agreement made between them, and that the company has written the policy in accordance to the application, and is not chargeable with negligence for failure to examine such instruments to discover errors and omissions.

California Reclamation Co. v. New Zealand Ins. Co., 138 Pac. 900, 23 Cal. App. 611; *A. A. Rake & Son v. Century Fire Ins. Co.*, 148 Iowa, 170, 125 N. W. 207; *Pflester v. Missouri State Life Ins. Co.*, 85 Kan. 97, 116 Pac. 245.

As illustrating this rule it was held in *Employers' Liability Assur. Corp. v. Grand Rapids Bridge Co.*, 139 Mich. 351, 102 N. W. 975, that where defendant's written proposal for employer's liability insurance contained a specified rate of premium, which was written in the proposal by plaintiff's agent, who assured defendant that it was not necessary to retain a copy of the proposal, as a copy would be attached to the policy, but, the rate stated in the proposal being erroneous, the correct rate was stated in the copy attached to the policy delivered, defendant was entitled to assume that the rate specified therein was the same as that contained in the proposal, and was not estopped to assert such rate as the contract rate by its failure to examine the policy after delivery and object to the variance contained therein. And it was held in *Federal Life Ins. Co. v. Hoskins* (Tex. Civ. App.) 185 S. W. 607, that an insured, induced to sign an application by agent's false representations, that it provides for the policy agreed upon, when, in fact, it provides for a materially different policy, is not estopped from setting up such false representations, unless inexcusably negligent in not informing himself.

In *Williams v. Ætna Fire Ass'n*, 30 Ohio Cir. Ct. R. 197, it was said that a mutual company issuing a policy without the word "mutual" conspicuously printed therein, as provided by Rev. St. § 3653 (Lan. § 5864), and inducing its acceptance by fraudulently representing that there would be no contingent liability thereon, acts unlawfully and commits a fraud upon the insured, and hence, where he informed the agent of a company that he would not accept a policy in a mutual company, and there was sent him through the agent a paper in form and appearance like unto a standard cash policy, which was received by him after paying the sum specified therein as the cash premium, and placed with other like papers without critical inspection, where it remained until he received notice to pay an assessment thereunder, several months later, he did not accept such policy, nor is he estopped from denying liability thereunder.

In action for breach of executory oral contract to insure property, amended complaint, stating that plaintiff accepted the policy issued by defendant through his ignorance of its legal effect, was insufficient to state a cause of action. *Greenberg v. German-American Ins. Co.*, 83 Or. 662, 160 Pac. 536, judgment affirmed on rehearing 83 Or. 662, 163 Pac. 820.

7. ESTOPPEL TO PLEAD ULTRA VIRES AS TO THE INSURANCE CONTRACT

619-620. (b) Estoppel of insurer—Later doctrine.

619 (b). An insurance company is estopped to deny its authority to enter into a contract, when the contract has been executed by the other party and the company has received the benefits.

Ancient Order of the Pyramids v. Dixon, 45 Colo. 95, 100 Pac. 427; *Davis v. National Casualty Co.*, 115 Minn. 125, 131 N. W. 1013; *Cass County v. Mercantile Town Mut. Ins. Co.*, 188 Mo. 1, 86 S. W. 237; *Edwards v. American Patriots*, 162 Mo. App. 231, 144 S. W. 1117; *Adams v. Farmers' Mut. Fire Ins. Co.*, 90 S. W. 747, 115 Mo. App. 21; *Knott v. Security Mut. Life Ins. Co.*, 144 S. W. 178, 161 Mo. App. 579; *Buchanan v. Same* (Mo. App.) 144 S. W. 185; *Coulson v. Flynn*, 181 N. Y. 62, 73 N. E. 507, affirming 90 App. Div. 613, 86 N. Y. Supp. 1133; *Campbell v. Order of Washington*, 53 Wash. 398, 102 Pac. 410.

If, on the other hand, no benefit was received by the insurer the doctrine of estoppel does not apply. Thus, where a mutual benefit

society by which plaintiff's wife was insured for plaintiff's benefit made an ineffectual attempt to consolidate with defendant association, and the latter attempted to take over all of the assets and certificates of the former, but received nothing of value belonging to plaintiff or his wife, and made no promise or agreement with them based on any consideration, plaintiff could not recover from defendant, on his wife's certificate, after her death, on the ground of equitable estoppel (*Whaley v. Bankers' Union of the World*, 88 S. W. 259, 39 Tex. Civ. App. 385).

620-621. (c) Same—Reception of benefits

620 (c). In accord with the rule as to reception of benefits, it is held in many cases that, where insured has fully performed the terms of a contract of insurance, and the insurer has received and retained a premium paid, the latter cannot evade performance on the ground that the contract is ultra vires.

Beggs v. Supreme Council Catholic Knights and Ladies of America, 146 Ill. App. 168; *Davis v. National Casualty Co.*, 115 Minn. 125, 131 N. W. 1013; *Trost v. Delaware Farmers' Mut. Fire Ins. Co.*, 137 Minn. 208, 163 N. W. 290; *Knott v. Security Mut. Life Ins. Co.*, 161 Mo. App. 579, 144 S. W. 178; *Redding v. Same*, 144 S. W. 185; *Edwards v. American Patriots*, 144 S. W. 1117, 162 Mo. App. 231; *Coulson v. Flynn*, 181 N. Y. 62, 73 N. E. 507, affirming 90 App. Div. 613, 86 N. Y. Supp. 1133; *Christenson v. El Riad Temple, Ancient Arabic Order Nobles of Mystic Shrine of Sioux Falls*, 37 S. D. 68, 156 N. W. 581; *Campbell v. Order of Washington*, 102 Pac. 410, 53 Wash. 398.

621. (d) Same—Insured's knowledge of limitation

621 (d). The rule that the doctrine of estoppel by benefits will not apply where the insured had knowledge of the limitation is illustrated by *Gordon v. American Patriots* (Tex. Civ. App.) 141 S. W. 331. In that case an Illinois mutual benefit society authorized by the laws of Illinois to issue certificates for death or disability benefits, and prohibited from diverting the fund for any other purpose, attempted to consolidate with a Missouri mutual benefit society; but there was no statute of either state authorizing the consolidation. A member of the Missouri society knew the facts before he made payments of assessments to the consolidated society. It was held that the consolidated society was not estopped from relying on the illegality of the consolidation and from denying liability on the certificate issued to the member.

621-622. (e) Same—Character of ultra vires acts

622 (e). If a contract is not absolutely prohibited by the statute or charter, the insurer cannot as a rule invoke the defense of ultra vires, as the doctrine of estoppel by reception of benefits will apply.

Binder v. National Masonic Acc. Ass'n, 102 N. W. 190, 127 Iowa, 25;
Cass County v. Mercantile Town Mut. Ins. Co., 86 S. W. 237, 188 Mo. 1; *Hopkins v. Connecticut General Life Ins. Co.*, 160 N. Y. Supp. 247, 174 App. Div. 23, reversing judgment (Sup.) 158 N. Y. Supp. 79.

So, if the limitation on the powers of the insurer is contained in its charter, the company is not precluded from pleading it as a defense.

Beggs v. Supreme Council Catholic Knights and Ladies of America, 146 Ill. App. 168; *Sowersby v. Royal League*, 159 Ill. App. 626; *Sherry v. Women's Catholic Order of Foresters*, 166 Ill. App. 254; *McCann v. Ladies of the Maccabees of the World*, 182 Ill. App. 319; *Timberlake v. Supreme Commandery, United Order of the Golden Cross of the World*, 94 N. E. 685, 208 Mass. 411, 36 L. R. A. (N. S.) 597; *Tulte v. Supreme Forest Woodmen Circle*, 187 S. W. 137, 193 Mo. App. 619; *Allison v. Fidelity Mut. Fire Ins. Co.*, 81 Neb. 494, 116 N. W. 274, 129 Am. St. Rep. 694.

In *McCartney v. Supreme Tent Knights of Maccabees*, 132 Ill. App. 15, the court went a step further and, basing its decision on the principle that powers not expressly granted in the charter are impliedly withheld, laid down the rule that the company is not estopped to plead ultra vires as to an act not expressly authorized by its charter.

On the other hand, if the limitation is one imposed by a by-law only, the doctrine of estoppel will apply.

Beggs v. Supreme Council Catholic Knights and Ladies of America, 146 Ill. App. 168; *Sherry v. Women's Catholic Order of Foresters*, 166 Ill. App. 254.

VI. CONSTRUCTION OF THE CONTRACT

1. GENERAL RULES OF CONSTRUCTION OF INSURANCE CONTRACTS

627-630. (a) Application of general rules of construction

627 (a). A policy of insurance, though more or less technical in its character and terms, is nevertheless fundamentally a contract by which must be measured the rights of the insured and the obligations of the insurer.

Atlas Reduction Co. v. New Zealand Ins. Co., 138 Fed. 497, 71 C. C. A. 21, 9 L. R. A. (N. S.) 433, affirming (C. C.) 121 Fed. 929; *Lockett-Wake Tobacco Co. v. Globe & Rutgers Fire Ins. Co.* (C. C.) 171 Fed. 147; *Ingle v. Batesville Grocery Co.*, 117 S. W. 241, 89 Ark. 378; *Mutual Ben. Life Ins. Co. v. O'Brien* (Ky.) 116 S. W. 750; *Burns v. Burns*, 82 N. E. 1107, 190 N. Y. 211, affirming 109 App. Div. 98, 95 N. Y. Supp. 797; *Puget Sound Imp. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 100 Pac. 190, 52 Wash. 124.

628 (a). Consequently insurance policies should be construed according to the rules applied in the construction of other kinds of contracts.

This rule is elementary and reference to the following cases is deemed sufficient. *Laventhal v. Fidelity & Casualty Co.*, 9 Cal. App. 275, 98 Pac. 1075; *Order of United Commercial Travelers of America v. Boaz*, 150 Pac. 822, 27 Colo. App. 423; *Continental Ins. Co. v. Rosenberg*, 7 Pennewill (Del.) 174, 74 Atl. 1073; *Modern Woodmen of America v. Vincent*, 82 N. E. 475, 40 Ind. App. 711, 14 Ann. Cas. 89, denying rehearing 40 Ind. App. 711, 80 N. E. 427, 14 Ann. Cas. 89; *Spring Garden Ins. Co. v. Imperial Tobacco Co.*, 132 Ky. 7, 116 S. W. 234, 20 L. R. A. (N. S.) 277, 136 Am. St. Rep. 164; *Washburn v. United States Casualty Co.*, 106 Me. 411, 76 Atl. 902; *Tyler v. Treasurer and Receiver General*, 226 Mass. 306, 115 N. E. 300, L. R. A. 1917D, 633; *State ex rel. American Fire Ins. Co. v. Ellison*, 269 Mo. 410, 190 S. W. 879; *American Life & Accident Ins. Co. v. Nirdlinger*, 112 Miss. 74, 73 South. 875; *Ferguson v. Northern Assur. Co. of London*, 26 S. D. 346, 128 N. W. 125; *Royal Ins. Co. v. Okasaki* (Tex. Civ. App.) 177 S. W. 200; *French v. Fidelity & Casualty Co.*, 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011.

Nevertheless contracts of insurance should be considered in view of their general objects and the conditions prescribed by the insurers, rather than on the basis of a strict technical interpretation (*Raulet v. Northwestern Nat. Ins. Co. of Milwaukee*, 157 Cal. 213, 107 Pac. 292). In determining what a contract of insurance means, the circumstances surrounding the making of it, and affecting the subject to which it relates, may be taken into consideration in ascertaining the meaning of its provision as the parties understood it. Such a contract should have a reasonable interpretation (*Mellon v. Ohio German Fire Ins. Co.*, 40 Pa. Super. Ct. 623).

The policy of insurance, with its clauses, conditions, and stipulations, is the law of the insurer and the insured, and the intent of the parties must be gathered from the language of the policy itself.

Laventhal v. Fidelity & Casualty Co. of New York, 98 Pac. 1075, 9 Cal. App. 275; *North British & Mercantile Ins. Co. v. Tye*, 58 S. E. 110, 1 Ga. App. 380; *French v. Fidelity & Casualty Co. of New York*, 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011; *Daniel v. Modern Woodmen*, 53 Tex. Civ. App. 570, 118 S. W. 211; *Stone v. Insurance Co. of North America*, 105 Pac. 856, 56 Wash. 427.

Every part of the contract should be considered in arriving at an interpretation thereof, and in arriving at the true intent of the parties.

Prudential Ins. Co. v. Chestnut, 8 Ga. App. 246, 68 S. E. 952; *Marbut v. Empire Life Ins. Co.*, 85 S. E. 834, 143 Ga. 654; *Farmers' & Merchants' Mutual Life Ass'n v. Mason* (Ind. App.) 116 N. E. 852; *Spring Garden Ins. Co. v. Imperial Tobacco Co.*, 132 Ky. 7, 116 S. W. 234, 20 L. R. A. (N. S.) 277, 136 Am. St. Rep. 164; *Patterson v. Standard Accident Ins. Co.*, 178 Mich. 288, 144 N. W. 491, 51 L. R. A. (N. S.) 583, Ann. Cas. 1915A, 632; *Taylor v. Loyal Protective Ins. Co.* (Mo. App.) 194 S. W. 1055; *Central Trust & Safe Deposit Co. v. Dubuque Fire & Marine Ins. Co.*, 1 Ohio App. 447, 34 Ohio Cir. Ct. R. 218; *New York & P. R. S. S. Co. v. Aetna Ins. Co.* (D. C.) 192 Fed. 212.

629 (a). Not only should every part of a policy be considered in arriving at the true interpretation thereof, but such construction should, if possible, be put on the contract as will harmonize and give effect to all of its provisions.

Hastings v. Bankers' Accident Ins. Co. of Des Moines, 140 Iowa, 626, 119 N. W. 79; *Dahms & Sons Co. v. German Fire Ins. Co.*, 153 Iowa, 168, 132 N. W. 870, Ann. Cas. 1913D, 1301; *Aetna Life Ins. Co. v. Bowling Green Gaslight Co.*, 150 S. W. 994, 150 Ky. 732;

Rupert v. Supreme Court of United Order of Foresters, 102 N. W. 715, 94 Minn. 293; Lite v. Firemen's Ins. Co. of Newark, N. J., 104 N. Y. S. 434, 119 App. Div. 410; Capital Fire Ins. Co. v. Carroll, 26 Okl. 286, 109 Pac. 535; Crosby v. Vermont Accident Ins. Co., 84 Vt. 510, 80 Atl. 817.

Insurance contracts like other contracts are to be construed with reference to the intent of the parties, to be ascertained from the terms and conditions.

Merchants' Mut. Fire Ins. Co. of Colorado v. Harris, 51 Colo. 95, 116 Pac. 143; Dodge v. Grain Shippers' Mut. Fire Ins. Ass'n, 176 Iowa, 316, 157 N. W. 955; Perrin v. Stuyvesant Ins. Co., 140 La. 812, 74 South. 110; Bickford v. Aetna Ins. Co., 63 Atl. 552, 101 Me. 124; Anderson v. Aetna Life Ins. Co., 74 Atl. 1051, 75 N. H. 375; Etheredge v. Aetna Ins. Co., 102 S. C. 313, 86 S. E. 687; Miller v. St. Paul Fire & Marine Ins. Co., 26 S. D. 454, 128 N. W. 609; Seay v. Georgia Life Ins. Co., 179 S. W. 312, 132 Tenn. 673, Ann. Cas. 1916E, 1157; Hocking v. British America Assur. Co. of Toronto, Canada, 62 Wash. 73, 113 Pac. 259, 36 L. R. A. (N. S.) 1155, Ann. Cas. 1912C, 965.

In construing contract of indemnity insurance, where no extrinsic evidence is offered, situation of parties, purpose to be accomplished, and when are to be considered (Maryland Casualty Co. v. Hanlon [N. J. Ch.] 100 Atl. 352).

Where there are no ambiguities or uncertainties, and no conflicting inferences to be drawn from the language of the policy, the construction thereof is a question of law for the court.

Gash v. Home Ins. Co., 153 Ill. App. 31; Enright v. National Council, Knights and Ladies of Security, 97 N. E. 681, 253 Ill. 460, reversing judgment 161 Ill. App. 365; Equitable Life Assur. Society of United States v. Meuth, 140 S. W. 157, 145 Ky. 160, Ann. Cas. 1913B, 661, judgment modified 141 S. W. 37, 145 Ky. 746; Mutual Life Ins. Co. of New York v. Murray, 75 Atl. 348, 111 Md. 600; Rogers v. Modern Brotherhood of America, 131 Mo. App. 353, 111 S. W. 518.

630-632. (b) Same—Not dependent on kind of insurance

630 (b). The fact that a fire policy is a standard form prescribed by statute does not alter its status as a contract, which must be construed by the rules of construction usually applied to insurance contracts.

Dunton v. Westchester Fire Ins. Co., 104 Me. 372, 71 Atl. 1037, 20 L. R. A. (N. S.) 1058; Gazzam v. German Union Fire Ins. Co., 155 N. C. 330, 71 S. E. 434, Ann. Cas. 1912C, 362.

A policy insuring a lessee against loss to his leasehold by fire is to be construed by the same rules applicable to ordinary fire insurance policies (*Kahn v. American Ins. Co.*, 137 Minn. 16, 162 N. W. 685).

631 (b). Certificates of membership in mutual benefit associations being in all essentials contracts of life insurance, the rights of the parties will be determined on the same principles as are applied to other life insurance contracts.

Moore v. Life & Annuity Ass'n, 148 Pac. 981, 93 Kan. 398, 95 Kan. 591, 148 Pac. 981, second rehearing denied 96 Kan. 397, 151 Pac. 1107; *Morgan v. Independent Order of Sons and Daughters of Jacob*, 90 Miss. 864, 44 South. 791; *Gruwell v. National Council of Knights and Ladies of Security*, 104 S. W. 884, 126 Mo. App. 496; *Thompson v. Royal Neighbors of America*, 154 Mo. App. 106, 133 S. W. 146; *Morrison v. Mutual Benev. Ass'n*, 78 S. C. 398, 59 S. E. 27; *Wintergerst v. Court of Honor*, 185 Mo. App. 373, 170 S. W. 346.

Contracts indemnifying against loss by the defalcations of employes, by insolvency of debtors, or by defects in titles are essentially contracts of insurance, and are to be construed by the same general rules as are applicable to other contracts of insurance.

United States Fidelity & Guaranty Co. v. Bank of Batesville, 87 Ark. 348, 112 S. W. 957; *Co-operative Stores Co. v. United States Fidelity Guaranty Co.*, 137 Tenn. 609, 195 S. W. 177; *National Surety Co. v. Murphy-Walker Co.* (Tex. Civ. App.) 174 S. W. 997; *United States Fidelity & Guaranty Co. v. First Nat. Bank*, 84 N. E. 670, 233 Ill. 475, affirming 137 Ill. App. 382 (fidelity insurance); *Wheeler v. Equitable Trust Co.*, 221 Pa. 276, 70 Atl. 750 (title insurance); *Betts v. Massachusetts Bonding & Ins. Co.* (N. J.) 101 Atl. 257 (dentist's indemnity).

632-634. (c) Liberal or strict construction

632 (c). Contracts of insurance will not be subjected to any critical or technical interpretation, but, whenever there is an ambiguity in the language used, will be liberally construed in favor of the insured.

The rule has been applied in the following cases involving fire insurance contracts: *Royal Exch. Assurance of London v. Thrower* (D. C.) 240 Fed. 811; *O'Brien v. North River Ins. Co. of City of New York*, 128 C. C. A. 618, 212 Fed. 102, L. R. A. 1917C, 722; *Pennsylvania Fire Ins. Co. v. Draper*, 187 Ala. 103, 65 South. 923; *Arkansas Ins. Co. v. McManus*, 86 Ark. 115, 110 S. W. 797; *United Assur. Ass'n v.*

Frederick (Ark.) 195 S. W. 691; Pacific Union Club v. Commercial Union Assur. Co., 107 Pac. 728, 12 Cal. App. 503; Same v. Palatine Ins. Co., 107 Pac. 733, 12 Cal. App. 515; Pacific Heating & Ventilating Co. v. Williamsburgh City Fire Ins. Co. of Brooklyn, 158 Cal. 367, 111 Pac. 4; National Mut. Fire Ins. Co. v. Duncan, 44 Colo. 472, 98 Pac. 634, 20 L. R. A. (N. S.) 340; Connecticut Fire Ins. Co. v. Colorado Leasing, Min. & Mill. Co., 116 Pac. 154, 50 Colo. 424; Concordia Fire Ins. Co. v. Bowen, 121 Ill. App. 35; Hartford Fire Ins. Co. v. Tewes, 132 Ill. App. 321; Merchants' Underwriters at Indemnity Exchange v. Parkhurst-Davis Mercantile Co., 140 Ill. App. 504, decree affirmed Parkhurst-Davis Mercantile Co. v. Merchant Underwriters at the Indemnity Exch., 86 N. E. 1062, 237 Ill. 492; Coen v. Denver Tp. Mut. Fire Ins. Co., 155 Ill. App. 332; Deltz v. Dunham & Chemung Tp. Mut. Fire Ins. Co., 160 Ill. App. 180; Ohio Farmers' Ins. Co. v. Glaze, 55 Ind. App. 147, 101 N. E. 734; Globe & Rutgers Fire Ins. Co. v. Hamilton (Ind. App.) 116 N. E. 597; Jordan v. Iowa Mut. Tornado Ins. Co. of Des Moines, 151 Iowa, 73, 130 N. W. 177, Ann. Cas. 1913A, 266 (tornado insurance); General Accident, Fire & Life Assur. Corp. v. Louisville Home Telephone Co., 175 Ky. 96, 193 S. W. 1031, L. R. A. 1917D, 952; Hurst Home Ins. Co. v. Deatley, 175 Ky. 728, 194 S. W. 910, L. R. A. 1917E, 750; Bickford v. Aetna Ins. Co., 101 Me. 124, 63 Atl. 552, 8 Ann. Cas. 92; Trost v. Delaware Farmers' Mut. Fire Ins. Co., 137 Minn. 208, 163 N. W. 290; Walton v. Phoenix Ins. Co., 162 Mo. App. 316, 141 S. W. 1138; Shivers v. Farmers' Mut. Fire Ins. Co., 99 Miss. 744, 55 South. 965; Funke Estate v. Law Union & Crown Ins. Co., 97 Neb. 412, 150 N. W. 262; Bray v. Virginia Fire & Marine Ins. Co., 139 N. C. 390, 51 S. E. 922; Higson v. North River Ins. Co., 152 N. C. 206, 67 S. E. 509; Arnold v. Indemnity Fire Ins. Co. of New York, 67 S. E. 574, 152 N. C. 232; Lite v. Firemen's Ins. Co., 119 App. Div. 410, 104 N. Y. Supp. 434, affirmed in 193 N. Y. 639, 86 N. E. 1127; Taylor v. Insurance Co. of North America, 25 Okl. 92, 105 Pac. 354, 138 Am. St. Rep. 906; McGinnis v. St. Paul Fire & Marine Ins. Co., 38 Pa. Super. Ct. 390; Livingstone v. Boston Ins. Co., 99 Atl. 212, 255 Pa. 1; Bennettsville & C. R. Co. v. Glens Falls Ins. Co., 79 S. E. 717, 96 S. C. 44; Henderson v. Abbeville Greenwood Mut. Ins. Ass'n, 81 S. E. 171, 96 S. C. 430; Edge v. St. Paul Fire & Marine Ins. Co., 20 S. D. 190, 105 N. W. 281; Kennedy v. Agricultural Ins. Co. of Sioux Falls, 21 S. D. 145, 110 N. W. 116; Royal Ins. Co. v. Texas & G. Ry. Co., 53 Tex. Civ. App. 154, 115 S. W. 117; Dorroh-Kelly Mercantile Co. v. Orient Ins. Co., 104 Tex. 199, 135 S. W. 1165, affirming Orient Ins. Co. v. Dorroh-Kelly Mercantile Co., 59 Tex. Civ. App. 289, 126 S. W. 616; Hartford Fire Ins. Co. v. Dorroh, 63 Tex. Civ. App. 560, 133 S. W. 465; Burbank v. Pioneer Mut. Ins. Ass'n, 60 Wash. 253, 110 Pac. 1005, Ann. Cas. 1912B, 762; Tucker v. Colonial Fire Ins. Co., 58 W. Va. 30, 51 S. E. 86; Slemers v. Meeme Mut. Home Protection Ins. Co., 143 Wis. 114, 126 N. W. 669, 139 Am. St. Rep. 1083; Royal

Ins. Co. v. O. L. Walker Lumber Co., 24 Wyo. 59, 155 Pac. 1101, Ann. Cas. 1917E, 1174, affirming judgment on rehearing 23 Wyo. 284, 148 Pac. 340.

In the following cases life and accident policies were involved: *Maryland Casualty Co. v. Finch*, 147 Fed. 388, 77 C. C. A. 566, 8 L. R. A. (N. S.) 308; *Gotfredson v. German Commercial Accident Co.*, 218 Fed. 582, 134 C. C. A. 810, L. R. A. 1915D, 312; *Railway Mail Ass'n v. Moseley*, 211 Fed. 1, 127 C. O. A. 427; *National Life & Accident Ins. Co. v. Lokey*, 166 Ala. 174, 52 South. 45; *Anderson v. Mutual Life Ins. Co. of New York*, 130 Pac. 726, 164 Cal. 712, Ann. Cas. 1914B, 908; *Jennings v. Brotherhood Acc. Co.*, 44 Colo. 68, 96 Pac. 982, 18 L. R. A. (N. S.) 109, 130 Am. St. Rep. 109; *Candelaria v. Columbian Nat. Life Ins. Co.*, 60 Colo. 340, 153 Pac. 447; *Dresser v. Hartford Life Ins. Co.*, 80 Conn. 681, 70 Atl. 39; *Baltimore Life Ins. Co. v. Floyd*, 5 Boyce (Del.) 431, 94 Atl. 515, affirming judgment 5 Boyce (Del.) 201, 91 Atl. 653; *Patterson v. Ocean Accident & Guarantee Corp.*, 25 App. D. C. 46; *Missouri State Life Ins. Co. v. Lovelace*, 58 S. E. 93, 1 Ga. App. 446; *Arnold v. Empire Mut. Annuity & Life Ins. Co.*, 60 S. E. 470, 3 Ga. App. 685; *Royal Union Life Ins. Co. v. McLendon*, 4 Ga. App. 620, 62 S. E. 101; *Prudential Ins. Co. of America v. Chestnut*, 8 Ga. App. 246, 68 S. E. 952; *Mutual Life Ins. Co. of New York v. Durden*, 9 Ga. App. 797, 72 S. E. 295; *State Nat. Bank of Springfield v. United States Life Ins. Co.*, 87 N. E. 396, 238 Ill. 148, affirming 142 Ill. App. 624; *Wilkinson v. Aetna Life Ins. Co.*, 88 N. E. 550, 240 Ill. 205, 25 L. R. A. (N. S.) 1256, 130 Am. St. Rep. 269, affirming 144 Ill. App. 38; *Peterson v. Manhattan Life Ins. Co.*, 91 N. E. 466, 244 Ill. 329, 18 Ann. Cas. 96, reversing 115 Ill. App. 421; (1905) *Travelers' Ins. Co. v. Ayers*, 119 Ill. App. 402, judgment affirmed 75 N. E. 506, 217 Ill. 390, 2 L. R. A. (N. S.) 168; (1905) *Commercial Union Assur. Co., Limited, of London, England, v. Parker*, 119 Ill. App. 126; *Provident Sav. Life Assur. Soc. v. Marshall*, 125 Ill. App. 101; *Minnesota Mut. Life Ins. Co. v. Link*, 131 Ill. App. 89, affirmed *Same v. Welsh*, 82 N. E. 637, 230 Ill. 273; *Ingersoll v. Mutual Life Ins. Co. of New York*, 156 Ill. App. 568; *Anson v. New York Life Ins. Co.*, 162 Ill. App. 505, judgment affirmed, 252 Ill. 369, 96 N. E. 846, 37 L. R. A. (N. S.) 555; *Arrowsmith v. Old Colony Life Ins. Co.*, 164 Ill. App. 44; *Iowa Life Ins. Co. v. Haughton*, 46 Ind. App. 467, 87 N. E. 702, reversing on rehearing 85 N. E. 127; *Binder v. National Masonic Acc. Ass'n*, 102 N. W. 190, 127 Iowa, 25; *Kirkpatrick v. Aetna Life Ins. Co.*, 141 Iowa, 74, 117 N. W. 1111, 22 L. R. A. (N. S.) 1255; *Aetna Life Ins. Co. v. Bethel*, 131 S. W. 523, 140 Ky. 609; *Fidelity & Casualty Co. of New York v. Hart*, 133 S. W. 996, 142 Ky. 25; *Metropolitan Plate Glass & Casualty Ins. Co. v. Hawes' Ex'x*, 149 S. W. 1110, 150 Ky. 52, 42 L. R. A. (N. S.) 700 (health insurance); *Pacific Mut. Life Ins. Co. v. McCabe*, 162 S. W. 1136, 157 Ky. 270; *Mutual Life Ins. Co. v. New*, 125 La. 41, 51 South. 61, 27 L. R. A. (N.

S.) 431, 136 Am. St. Rep. 326; *Hatch v. United States Casualty Co.* 197 Mass. 101, 83 N. E. 398, 14 L. R. A. (N. S.) 503, 125 Am. St. Rep. 332, 14 Ann. Cas. 290; *Lilja v. Standard Accident Ins. Co. of Detroit*, 137 N. W. 266, 171 Mich. 378; *Zettler v. National Casualty Co.*, 145 N. W. 395, 124 Minn. 478; *Banta v. Continental Casualty Co.*, 113 S. W. 1140, 134 Mo. App. 222; *Schmohl v. Travelers' Ins. Co.* (Mo. App.) 189 S. W. 597, conforming to decision of Supreme Court *State ex rel. Schmohl v. Ellison*, 182 S. W. 740, 266 Mo. 580; *Germania Life Ins. Co. v. Bouldin*, 100 Miss. 660, 56 South. 609; *Schumacher v. Great Eastern Casualty & Indemnity Co. of New York*, 90 N. E. 353, 197 N. Y. 58, 27 L. R. A. (N. S.) 480, affirming 132 App. Div. 929, 117 N. Y. Supp. 1146; *Moest v. Continental Casualty Co.*, 55 Misc. Rep. 128, 104 N. Y. Supp. 553; *Garvey v. Phoenix Preferred Acc. Ins. Co. of Detroit*, Mich., 108 N. Y. Supp. 186, 123 App. Div. 106; *Dineen v. General Acc. Ins. Co. of Philadelphia*, 110 N. Y. Supp. 344, 126 App. Div. 167; *Christy v. American Temperance Life Ins. Ass'n*, 123 N. Y. Supp. 740, 68 Misc. Rep. 178; *Porter v. Casualty Co. of America*, 126 N. Y. Supp. 669, 70 Misc. Rep. 246; *Rayburn v. Pennsylvania Casualty Co.*, 138 N. C. 379, 50 S. E. 762, 107 Am. St. Rep. 548; *Collins v. United States Casualty Co.*, 172 N. C. 543, 90 S. E. 585; *Donahue v. Mutual Life Ins. Co. of New York* (N. D.) 164 N. W. 50; *Standard Accident Ins. Co. v. Hite*, 37 Okl. 305, 132 Pac. 333, 46 L. R. A. (N. S.) 996; *Oklahoma Nat. Life Ins. Co. v. Norton*, 44 Okl. 783, 145 Pac. 1138, L. R. A. 1915E, 695; *Stinchcombe v. New York Life Ins. Co.*, 46 Or. 316, 80 Pac. 213; *Moore v. Aetna Life Ins. Co.*, 75 Or. 47, 146 Pac. 151, L. R. A. 1915D, 264, Ann. Cas. 1917B, 1005; *Hughes v. Central Accident Ins. Co.*, 71 Atl. 923, 222 Pa. 462; *Krebs v. Philadelphia Life Ins. Co.*, 95 Atl. 91, 249 Pa. 330, Ann. Cas. 1917D, 1184; *Francis v. Prudential Ins. Co. of America*, 90 Atl. 205, 243 Pa. 380; *Pacific Mut. Life Ins. Co. v. Galbraith*, 115 Tenn. 471, 91 S. W. 204, 112 Am. St. Rep. 862; *Aetna Life Ins. Co. v. El Paso Electric Ry. Co.* (Tex. Civ. App.) 184 S. W. 628; *Algoe v. Pacific Mut. Life Ins. Co. of California*, 157 Pac. 993, 91 Wash. 324, L. R. A. 1917A, 1237; *French v. Fidelity & Casualty Co.*, 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011; *Bakalars v. Continental Casualty Co.*, 141 Wis. 43, 122 N. W. 721, 25 L. R. A. (N. S.) 1241, 18 Ann. Cas. 1123; *Kresge v. Maryland Casualty Co.*, 143 N. W. 668, 154 Wis. 627.

The rule has been applied to life contracts of reinsurance. *Federal Life Ins. Co. v. Kerr*, 173 Ind. 613, 89 N. E. 398, affirming (Ind. App.) 82 N. E. 943.

Certificates of mutual benefit associations were involved in the following cases: *Brotherhood of Locomotive Firemen & Enginemen v. Aday*, 97 Ark. 425, 134 S. W. 928, 34 L. R. A. (N. S.) 126; *O'Connor v. Grand Lodge A. O. U. W. of California*, 80 Pac. 688, 146 Cal. 484; *Estes v. Local Union, No. 43, United Brotherhood of Carpenters and*

Joiners of America, 97 Atl. 326, 90 Conn. 426; Hall v. Fraternal Union, 130 Ga. 820, 61 S. E. 977; Crosse v. Supreme Lodge, Knights and Ladies of Honor, 98 N. E. 261, 254 Ill. 80, 45 L. R. A. (N. S.) 162; Mutual Protective League v. McKee, 122 Ill. App. 376, affirmed 79 N. E. 25, 223 Ill. 364; Switchmen's Union of North America v. Colehouse, 131 Ill. App. 349, affirmed 81 N. E. 696, 227 Ill. 561; Grand Lodge, A. O. U. W. v. Oetzel, 139 Ill. App. 4; Marren v. North American Union, 145 Ill. App. 375; Bond v. Grand Lodge Brotherhood of Railroad Trainmen, 165 Ill. App. 496; Supreme Tent, Knights of the Maccabees of the World, v. Ethridge, 43 Ind. App. 475, 87 N. E. 1049; Supreme Council Catholic Benevolent Legion v. Grove, 176 Ind. 356, 96 N. E. 159, 36 L. R. A. (N. S.) 913; Modern Woodmen of America v. Miles, 178 Ind. 105, 97 N. E. 1009; Simpkins v. Hawkeye Commercial Men's Ass'n, 148 Iowa, 543, 126 N. W. 192; Rogers v. Modern Brotherhood, 181 Mo. App. 363, 111 S. W. 518; Small v. Court of Honor, 117 S. W. 116, 136 Mo. App. 434; Umbarger v. Supreme Council of the Royal League (Mo. App.) 118 S. W. 1199; Roseberry v. American Benev. Ass'n, 142 Mo. App. 552, 121 S. W. 785; Belle v. Travelers' Protective Ass'n, 155 Mo. App. 629, 135 S. W. 497; Mathews v. Modern Woodmen of America, 236 Mo. 326, 139 S. W. 151, Ann. Cas. 1912D, 483; Coghlan v. Supreme Conclave Improved Order of Heptasophs, 86 N. J. Law, 41, 91 Atl. 132; Graves v. Knights of the Maccabees of the World, 112 N. Y. Supp. 948, 128 App. Div. 660; Clemens v. Royal Neighbors of America, 103 N. W. 402, 14 N. D. 116, 8 Ann. Cas. 111; Pleasants v. Locomotive Engineers' Mut. Life & Accident Ins. Ass'n, 70 W. Va. 369, 73 S. E. 976, Ann. Cas. 1913E, 490.

The rule also applies in the construction of laws and rules of mutual benefit associations. See post, p. 701 (g).

Policies of employers' liability insurance were involved in the following cases: Aetna Indemnity Co. v. J. R. Crowe Coal & Mining Co., 154 Fed. 545, 83 C. C. A. 431; Pacific Coast Casualty Co. v. General Bonding & Casualty Ins. Co., 240 Fed. 36, 153 C. C. A. 72; Barclay v. London Guarantee & Accident Co., Limited, 105 Pac. 865, 46 Colo. 558; American Liability Co. v. Bowman (Ind. App.) 114 N. E. 992; United Zinc Cos. v. General Accident Assur. Corporation, Limited, 128 S. W. 836, 144 Mo. App. 380; Fairbanks Canning Co. v. London Guaranty & Accident Co., 154 Mo. App. 327, 133 S. W. 664; Mears Mining Co. v. Maryland Casualty Co., 144 S. W. 883, 162 Mo. App. 178; Century Realty Co. v. Frankfort Marine Accident & Plate Glass Ins. Co., 179 Mo. App. 123, 161 S. W. 624, 631; Same v. Travelers' Ins. Co., 179 Mo. App. 144, 161 S. W. 630; Maryland Casualty Co. v. Hanlon (N. J.) 100 Atl. 352; Cary Brick Co. v. Fidelity & Casualty Co. of New York, 147 N. Y. Supp. 414, 162 App. Div. 873; Henderson Lighting & Power Co. v. Maryland Casualty Co., 69 S. E. 234, 153 N. C. 275, 30 L. R. A. (N. S.) 1105.

The law does not require that an insured shall be held to a strict compliance with the terms of his policy, but to such a compliance as is fair and reasonable under the circumstances of the case (*Leiman v. Metropolitan Surety Co.*, 111 N. Y. Supp. 536). Nevertheless, when the court can give a policy that construction which, while preserving the protection given insured under its general terms, will also relieve insurer from the increased hazard against which it undertook to provide, such construction must be adopted (*Royal Ins. Co. v. Texas & G. Ry. Co.*, 53 Tex. Civ. App. 154, 115 S. W. 117).

The rule that doubtful terms in a fire policy must be construed favorably to insured applies to the construction of a standard fire policy (*Gazzam v. German Union Fire Ins. Co.*, 71 S. E. 434, 155 N. C. 330, Ann. Cas. 1912C, 362). And to the same effect is *Cottingham v. Maryland Motor Car Ins. Co.*, 168 N. C. 259, 84 S. E. 274, L. R. A. 1915D, 344, Ann. Cas. 1917B, 1237. On the other hand, it has been held in Wisconsin that the rule that policies of insurance should be liberally construed in favor of insured has no application, where the contract is in the form prescribed by statute (*Rosenthal v. Insurance Co. of North America*, 149 N. W. 155, 158 Wis. 550, L. R. A. 1915B, 361, Ann. Cas. 1916E, 395). And in New Jersey it was held that, where a policy is in the standard form approved by governmental authority, the maxim that the words of a writing are more strongly considered against the one offering it has no special application (*Mick v. Royal Exch. Assur.*, 87 N. J. Law, 607, 91 Atl. 102, 52 L. R. A. [N. S.] 1074).

Any ambiguity in the cancellation clause of an insurance policy will be resolved in favor of the insured.

American Automobile Ins. Co. v. Watts, 12 Ala. App. 518, 67 South. 758;
Hartford Fire Ins. Co. v. Stephens, 18 Ariz. 339, 161 Pac. 684.

633 (c). In view of the rule that the contract should be construed liberally in favor of the insured, it follows that provisions of the contract limiting or avoiding liability will be construed strictly against the insurer.

Reference may be made to the following cases: *Home Mixture Guano Co. v. Ocean Accident & Guarantee Corporation, Limited* (C. C.) 176 Fed. 600; *Industrial Mut. Indemnity Co. v. Hawkins*, 94 Ark. 417, 127 S. W. 457, 29 L. R. A. (N. S.) 635, 21 Ann. Cas. 1029; *Welch v. British-American Assur. Co.*, 82 Pac. 964, 148 Cal. 223, 113 Am. St. Rep. 223, 7 Ann. Cas. 396; *Arnold v. Empire Mut. Annuity & Life*

Ins. Co., 3 Ga. App. 685, 60 S. E. 470; *Hall v. General Accident Assur. Corporation*, 16 Ga. App. 66, 85 S. E. 600; *Williamson v. Warfield, Pratt, Howell Co.*, 136 Ill. App. 168; *London Guarantee & Accident Co. v. Morris*, 156 Ill. App. 533; *Brotherhood of Painters, Decorators and Paperhangers of America v. Barton*, 46 Ind. App. 160, 92 N. E. 64; *Same v. Peters*, 46 Ind. App. 733, 92 N. E. 183; *New York Life Ins. Co. v. Hardison*, 199 Mass. 190, 85 N. E. 410, 127 Am. St. Rep. 478; *Roseberry v. American Benev. Ass'n*, 142 Mo. App. 552, 121 S. W. 785; *Soehner v. Grand Lodge of Order of Sons of Herman*, 104 N. W. 871, 74 Neb. 399; *Harris v. American Casualty Co. of Reading, Pa.*, 83 N. J. Law, 641, 85 Atl. 194, 44 L. R. A. (N. S.) 70, Ann. Cas. 1914B, 846; *Darling v. Protective Assur. Society of Buffalo*, 127 N. Y. Supp. 486, 71 Misc. Rep. 113; *Bolte & Jansen v. Equitable Fire Ass'n*, 23 S. D. 240, 121 N. W. 773; *Breedon v. Aetna Life Ins. Co.*, 23 S. D. 417, 122 N. W. 348; *Scottish Union & National Ins. Co. v. Andrews & Matthews*, 40 Tex. Civ. App. 184, 89 S. W. 419; *Haywood v. Grand Lodge of Texas, K. P.* (Tex. Civ. App.) 138 S. W. 1194; *Logan v. Provident Sav. Life Assur. Soc.*, 57 W. Va. 384, 50 S. E. 529; *Beard v. Indemnity Ins. Co.*, 65 W. Va. 283, 64 S. E. 119. And see, generally, cases cited under 632 (c).

And especially will the rule apply where the policy was written by insurer's local agent without any written application, and by special arrangement was kept in his office until after loss (*Continental Ins. Co. v. Bair* [Ind. App.] 114 N. E. 763).

634-636. (d) Same—Guaranty insurance

635 (d). Contracts indemnifying employers against the defalcations of employes, though possessing some of the characteristics of surety bonds are in effect contracts of insurance. The rules of construction applied to insurance contracts rather than those applied to ordinary contracts of suretyship are therefore applicable, and any doubtful language should be construed strictly against the surety and in favor of the indemnity which the insured has reasonable grounds to expect.

Dominion Trust Co. v. National Surety Co., 221 Fed. 618, 137 C. C. A. 342, Ann. Cas. 1917C, 447; *American Bonding Co. v. Morrow*, 96 S. W. 613, 80 Ark. 49, 117 Am. St. Rep. 72; *Title Guaranty & Surety Co. v. Bank of Fulton*, 117 S. W. 537, 89 Ark. 471, 33 L. R. A. (N. S.) 676; *United States Fidelity & Guaranty Co. v. First Nat. Bank*, 137 Ill. App. 382, affirmed 84 N. E. 670, 233 Ill. 475; *American Surety Co. of New York v. Pangburn*, 182 Ind. 116, 105 N. E. 769, Ann. Cas. 1916E, 1126; *Evansville Ice & Storage Co. v. Fidelity & Casualty Co. of New York*, 61 Ind. App. 194, 111 N. E. 812; *American Bond-*

ing Co. of Baltimore v. Ballard County Bank's Assignee, 165 Ky. 63, 176 S. W. 368; George A. Hormel & Co. v. American Bonding Co., 112 Minn. 288, 128 N. W. 12, 33 L. R. A. (N. S.) 513; Roark v. City Trust, Safe Deposit & Surety Co., 110 S. W. 1, 130 Mo. App. 401; Long Bros. Grocery Co. v. United States Fidelity & Guaranty Co., 110 S. W. 29, 130 Mo. App. 421; Commercial Bank v. Maryland Casualty Co. (Mo. App.) 187 S. W. 103; Most v. Massachusetts Bonding & Ins. Co. (Mo. App.) 196 S. W. 1064; Rosenthal v. American Bonding Co. of Baltimore, 124 N. Y. Supp. 905; Duschene v. National Surety Co. of New York, 139 N. Y. Supp. 881, 79 Misc. Rep. 232; Rankin v. United States Fidelity & Guaranty Co., 99 N. E. 314, 86 Ohio St. 267; Southern Surety Co. v. Tyler & Simpson Co., 30 Okl. 116, 120 Pac. 936; Farmers' & Merchants' State Bank of Verdon v. United States Fidelity & Guaranty Co., 28 S. D. 315, 133 N. W. 247, 36 L. R. A. (N. S.) 1152; Louisville & N. R. Co. v. United States Fidelity & Guaranty Co., 125 Tenn. 658, 148 S. W. 671; Hunter v. United States Fidelity & Guaranty Co., 167 S. W. 692, 129 Tenn. 572; Griffin v. Zuber, 52 Tex. Civ. App. 288, 113 S. W. 961; United American Fire Ins. Co. v. American Bonding Co. of Baltimore, 131 N. W. 994, 146 Wis. 573, 40 L. R. A. (N. S.) 661; Whinfield v. Massachusetts Bonding & Ins. Co., 162 Wis. 1, 154 N. W. 632.

Such a contract has all the essential features of an insurance contract, and is not to be construed according to the rules of law applicable to the ordinary accommodation surety (First Nat. Bank v. United States Fidelity & Guaranty Co. of Baltimore, 137 N. W. 742, 150 Wis. 601).

The rule has been applied to contracts of title insurance (Broadway Realty Co. v. Lawyers' Title Ins. & Trust Co., 154 N. Y. Supp. 1024, 91 Misc. Rep. 137) and credit insurance (Philadelphia Casualty Co. v. Fechheimer, 220 Fed. 401, 136 C. C. A. 25, Ann. Cas. 1917D, 64). A policy of credit insurance should not be so narrowly construed as to place upon the insured any unreasonable or unnecessary labor or expense in the presentation of his claim, nor should it be so liberally construed as to place upon the insurance company a liability which, by the fair construction of the terms of the policy, it had not contracted to assume (Philadelphia Casualty Co. v. Cannon & Byers Millinery Co., 133 Ky. 745, 118 S. W. 1004).

636-637. (e) Same—Contracts should be construed so as to sustain indemnity

636 (e). The general principle that forfeitures are not favored in law is especially applicable to insurance contracts. Therefore
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contracts of insurance will, if possible, be construed so as to avoid a forfeiture.

Reference may be made to the following cases: Continental Casualty Co. v. Ogburn, 175 Ala. 357, 57 South. 852, Ann. Cas. 1914D, 377; Maloney v. Maryland Casualty Co., 113 Ark. 174, 167 S. W. 845; Willey v. London & Lancashire Fire Ins. Co., 89 Conn. 35, 92 Atl. 678; Petello v. Teutonia Fire Ins. Co., 89 Conn. 175, 93 Atl. 137, L. R. A. 1915D, 812; Lee v. Casualty Co. of America, 96 Atl. 952, 90 Conn. 202; Patterson v. Ocean Accident & Guarantee Corp., 25 App. D. C. 46; Palatine Ins. Co. v. Whitfield (Fla.) 74 South. 869; Arnold v. Empire Mut. Annuity & Life Ins. Co., 60 S. E. 470, 3 Ga. App. 685; State Mut. Life Ins. Co. v. Forrest, 19 Ga. App. 296, 91 S. E. 428; Seymour v. Mutual Protective League, 155 Ill. App. 21; Glens Falls Ins. Co. v. Michael, 74 N. E. 964, 167 Ind. 659, 8 L. R. A. (N. S.) 708, rehearing denied 79 N. E. 905, 167 Ind. 659, 8 L. R. A. (N. S.) 708; Iowa Life Ins. Co. v. Haughton, 46 Ind. App. 467, 87 N. E. 702, reversing on rehearing 85 N. E. 127; Northern Assur. Co. of London v. Carpenter, 52 Ind. App. 432, 94 N. E. 779; Metropolitan Life Ins. Co. v. Johnson, 49 Ind. App. 233, 94 N. E. 785; Public Savings Ins. Co. of America v. Coombes, 59 Ind. App. 523, 108 N. E. 244; Ohio Farmers' Ins. Co. v. Williams (Ind. App.) 112 N. E. 556; Clark v. Iowa State Traveling Men's Ass'n, 156 Iowa, 201, 135 N. W. 1114, 42 L. R. A. (N. S.) 631; Settle v. Farmers' & Laborers' Co-operative Ins. Ass'n of Monroe County, 150 Mo. App. 520, 131 S. W. 136; Brittenham v. Sovereign Camp Woodmen of the World, 167 S. W. 587, 180 Mo. App. 523; Shearlock v. Mutual Life Ins. Co. of New York, 193 Mo. App. 430, 182 S. W. 89; Morgan v. Independent Order of Sons and Daughters of Jacob of America, 44 South. 791, 90 Miss. 864; Haas v. Mutual Life Ins. Co. of New York, 121 N. W. 996, 84 Neb. 682, 26 L. R. A. (N. S.) 747, 19 Ann. Cas. 58; Hilmer v. Western Travelers' Accident Ass'n, 125 N. W. 535, 86 Neb. 285, 27 L. R. A. (N. S.) 319; Johnson v. Grand Lodge A. O. U. W. of New Jersey, 81 N. J. Law, 511, 79 Atl. 333, affirming judgment 79 N. J. Law, 227, 75 Atl. 801; Bohles v. Prudential Ins. Co. of America, 84 N. J. Law, 315, 86 Atl. 438, affirming judgment (Sup.) 83 Atl. 904, 83 N. J. Law, 246; Melick v. Metropolitan Life Ins. Co., 91 Atl. 1070, 85 N. J. Law, 727, affirming judgment 87 Atl. 75, 84 N. J. Law, 437; Hayes v. New York Life Ins. Co., 124 N. Y. Supp. 792, 68 Misc. Rep. 558; Fitzpatrick v. Knights of Columbus, 128 N. Y. Supp. 366, 143 App. Div. 540, rehearing denied 144 App. Div. 936, 129 N. Y. Supp. 1122; Fitzpatrick v. Knights of Columbus, 100 N. E. 1127, 206 N. Y. 726, affirming judgment 128 N. Y. Supp. 366, 143 App. Div. 540; L. Black Co. v. London Guarantee & Accident Co., 144 N. Y. Supp. 424, 159 App. Div. 186; Springfield Fire & Marine Ins. Co. v. Griffin (Okla.) 166 Pac. 431; Friend v. Southern States Life Ins. Co. (Okla.) 160 Pac. 457, L. R. A. 1917B, 208; Brown v.

Connecticut Fire Ins. Co. of Hartford, Conn. (Okl.) 153 Pac. 173; Morrison v. Mutual Benev. Ass'n of Chesterfield County, 59 S. E. 27, 78 S. C. 398; Daniel v. Modern Woodmen of America, 53 Tex. Civ. App. 570, 118 S. W. 211; Norwich Union Fire Ins. Society v. Cheaney Bros., 61 Tex. Civ. App. 220, 128 S. W. 1163; Haywood v. Grand Lodge of Texas, K. P. (Tex. Civ. App.) 138 S. W. 1194; Philadelphia Underwriters' Agency of the Fire Ass'n of Philadelphia v. Neurenberg (Tex. Civ. App.) 144 S. W. 357; Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co. (Tex. Civ. App.) 167 S. W. 816; Insurance Co. of North America v. O'Bannon (Tex. Civ. App.) 170 S. W. 1055; International Travelers' Ass'n v. Votaw (Tex. Civ. App.) 197 S. W. 237; Mellen v. United States Health & Accident Ins. Co., 75 Atl. 273, 83 Vt. 242; Stratton's Adm'r v. New York Life Ins. Co., 115 Va. 257, 78 S. E. 636; Greenwood v. Royal Neighbors of America, 118 Va. 329, 87 S. E. 531; Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co., 110 Pac. 36, 59 Wash. 501, 140 Am. St. Rep. 863, reversing judgment, 106 Pac. 194, 56 Wash. 681, 28 L. R. A. (N. S.) 593, on rehearing; Pagel v. United States Casualty Co., 148 N. W. 878, 158 Wis. 278.

In accordance with the rules heretofore stated, it is a fundamental principle that contracts of insurance should be so construed, if possible, as not to defeat the claim to indemnity which, in making the contract, the insured intended to secure.

Fireman's Fund Ins. Co. v. Globe Nav. Co., 236 Fed. 618, 149 C. C. A. 614; Union Cent. Relief Ass'n v. Johnson (Ala.) 73 So. 816; Brotherhood of Locomotive Firemen & Enginemen v. Aday, 97 Ark. 425, 134 S. W. 928, 34 L. R. A. (N. S.) 126; Fidelity & Casualty Co. v. Meyer, 106 Ark. 91, 152 S. W. 995, 44 L. R. A. (N. S.) 493; Jennings v. Brotherhood Acc. Co., 44 Colo. 68, 96 Pac. 982, 18 L. R. A. (N. S.) 109, 130 Am. St. Rep. 109; German-American Ins. Co. v. Messenger, 25 Colo. App. 153, 136 Pac. 478; Queen Ins. Co. v. Patterson Drug Co. (Fla.) 74 South. 807, L. R. A. 1917D, 1091; Arnold v. Empire Mut. Annuity & Life Ins. Co., 60 S. E. 470, 3 Ga. App. 685; Perkins v. Empire Life Ins. Co., 17 Ga. App. 658, 87 S. E. 1094; Weisguth v. Supreme Tribe of Ben Hur, 194 Ill. App. 17, judgment affirmed 272 Ill. 541, 112 N. E. 350; Mathews Farmers' Mut. Live Stock Ins. Co. v. Moore, 58 Ind. App. 240, 108 N. E. 155; Fire Ass'n of Philadelphia v. Taylor, 91 Pac. 1070, 76 Kan. 392; Citizens' State Bank of Chautauqua v. Shawnee Fire Ins. Co., 137 Pac. 78, 91 Kan. 18, 49 L. R. A. (N. S.) 972; Spring Garden Ins. Co. v. Imperial Tobacco Co., 132 Ky. 7, 116 S. W. 234, 20 L. R. A. (N. S.) 277, 136 Am. St. Rep. 164; Continental Beneficial Ass'n v. Holt, 181 S. W. 648, 167 Ky. 806; Federal Ins. Co. v. Hiter, 164 Ky. 743, 176 S. W. 210, L. R. A. 1915E, 575; Cutting v. Atlas Mut. Ins. Co., 85 N. E. 174, 199 Mass. 380; Roseberry v. American Benev. Ass'n,

142 Mo. App. 552, 121 S. W. 785; *Mitchell v. German Commercial Accident Co.*, 179 Mo. App. 1, 161 S. W. 362; *De Mun Estate Corp. v. Frankfort General Ins. Co.*, 196 Mo. App. 1, 187 S. W. 1124; *Gropper v. Home Ins. Co.*, 135 N. Y. Supp. 1028, 77 Misc. Rep. 132; *Bray & Franklin v. Virginia Fire & Marine Ins. Co.*, 51 S. E. 922, 139 N. C. 390; *Crowell v. Maryland Motor Car Ins. Co.*, 169 N. C. 35, 85 S. E. 37, Ann. Cas. 1917D, 50; *Mutual Benefit Life Ins. Co. of Newark, N. J., v. Cummings*, 66 Or. 272, 126 Pac. 982, 133 Pac. 1169, 47 L. R. A. (N. S.) 252, Ann. Cas. 1915B, 535; *Lehman v. Lehman*, 29 Pa. Super. Ct. 60; *Porter v. Insurance Co. of North America*, 29 Pa. Super. Ct. 75; *Yost v. Anchor Fire Ins. Co.*, 38 Pa. Super. Ct. 594; *Mellon v. Ohio German Fire Ins. Co.*, 40 Pa. Super. Ct. 623; *Rawl v. American Cent. Ins. Co.*, 77 S. E. 1013, 94 S. C. 299, 45 L. R. A. (N. S.) 463, Ann. Cas. 1915A, 1231, 45 L. R. A. (N. S.) 463; *Andrews v. United States Casualty Co.*, 142 N. W. 487, 154 Wis. 82.

The fact that a construction of an insurance policy would involve hardship or absurdity or contradict its general purpose is strong evidence that such a construction was not intended by the parties, where it is open to a reasonable construction consonant with their general purpose (*Anderson v. Ætna Life Ins. Co.*, 74 Atl. 1051, 75 N. H. 375).

A bond insuring the performance of a contract is an insurance contract, and should be so construed as to afford insured the protection for which he paid (*National Surety Co. v. Price*, 162 Ky. 632, 172 S. W. 1072).

637-638. (f) Same—Qualification of the rule

637 (f). In construing policies, great favor is shown to the insured, the contract being construed strictly against insurer; but the rule does not go so far as to ignore or nullify express and unequivocal agreement of the insured, nor can it be invoked to change the nature of the contract, but only to resolve an uncertainty* or ambiguity in favor of the party likely to be misinformed or imposed on (*Brickell v. Atlas Assur. Co.*, 10 Cal. App. 17, 101 Pac. 16). The language in the contract is to be given the meaning which it conveys to the ordinary mind. A new contract will not by construction be made for the parties (*Grand Pacific Hotel Co. v. Michigan Commercial Ins. Co.*, 148 Ill. App. 143, judgment affirmed 243 Ill. 110, 90 N. E. 244). The rule that contracts of insurance must be liberally construed in favor of insured does not authorize the court to put into the contract words that would make a radical change in its meaning, or that would make for

the parties a contract they did not themselves make (Northwestern Mut. Life Ins. Co. v. Neafus, 140 S. W. 1026, 145 Ky. 563, 36 L. R. A. [N. S.] 1211). The contract cannot be given an interpretation at variance with the clear meaning of the language in which it is expressed (Mady v. Switchmen's Union of North America, 116 Minn. 147, 133 N. W. 472). So, too, though it is a rule of construction that words of exception or limitation of liability are to be strictly construed against the insurer, and forfeiture avoided if possible, yet if the language used by the parties has a plain meaning, and is not inconsistent with other clauses or provisions of their contract, effect must be given to it (Gilchrist Transp. Co. v. Phenix Ins. Co., 170 Fed. 279, 95 C. C. A. 475). In other words, notwithstanding the general rule that when the language of the policy is susceptible of two constructions that one will be adopted which is the more favorable to the insured, in that it will avoid a forfeiture and tend to secure him the indemnity he intended to secure, the real effect of the contract as shown by language that is clear and unambiguous cannot be destroyed by construction.

These qualifications of the general rule are supported by *Day v. Home Ins. Co.*, 177 Ala. 600, 58 South. 549, 40 L. R. A. (N. S.) 652; *Finkbohner v. Glens Falls Ins. Co.*, 6 Cal. App. 379, 92 Pac. 318; *First Nat. Bank v. Maryland Casualty Co.*, 162 Cal. 61, 121 Pac. 321, Ann. Cas. 1913C, 1170; *Messenger v. German-American Ins. Co.* 107 Pac. 643, 47 Colo. 448; *Hartford Fire Ins. Co. v. Northern Trust Co.*, 127 Ill. App. 355; *Jacobson v. Liverpool & L. & G. Ins. Co.*, 135 Ill. App. 20, judgment affirmed 83 N. E. 93, 231 Ill. 61; *Interstate Business Men's Accident Ass'n v. Atkinson*, 177 S. W. 254, 165 Ky. 532, L. R. A. 1915E, 656; *Doyle v. Maryland Casualty Co.*, 182 S. W. 946, 168 Ky. 795; *Dickinson v. Fraternal Aid Union*, 175 Ky. 410, 194 S. W. 349; *McEvoy v. Security Fire Ins. Co. of Baltimore*, 73 Atl. 157, 110 Md. 275, 22 L. R. A. (N. S.) 964, 132 Am. St. Rep. 428; *Mutual Life Ins. Co. of New York v. Murray*, 75 Atl. 348, 111 Md. 600; *Rocci v. Massachusetts Accident Co.*, 110 N. E. 972, 222 Mass. 336; *George A. Hormel & Co. v. American Bonding Co. of Baltimore*, 112 Minn. 288, 128 N. W. 12, 33 L. R. A. (N. S.) 513; *Banta v. Continental Casualty Co.*, 113 S. W. 1140, 134 Mo. App. 222; *Walton v. Phoenix Ins. Co.*, 162 Mo. App. 316, 141 S. W. 1138; *Strother v. Business Men's Accident Ass'n of America*, 188 S. W. 314, 193 Mo. App. 718; *Dunn v. Standard Life & Accident Ins. Co.*, 197 Mo. App. 457, 196 S. W. 100; *Rye v. New York Life Ins. Co.*, 88 Neb. 707, 130 N. W. 434; *Graves v. Knights of the Maccabees of the World*, 92 N. E. 792, 199 N. Y. 397, 139 Am. St. Rep. 912, reversing judgment 112 N. Y. Supp. 948, 128 App. Div. 660; *Preston v. Aetna Ins. Co.*, 85 N. E. 1006, 193 N. Y. 142, 19 L.

R. A. (N. S.) 133, reversing 118 App. Div. 784, 103 N. Y. Supp. 638; Houlihan v. Preferred Accident Ins. Co. of New York, 89 N. E. 927, 196 N. Y. 337, 25 L. R. A. (N. S.) 1261, reversing 127 App. Div. 630, 111 N. Y. Supp. 1048, rehearing denied 197 N. Y. 532, 90 N. E. 1160; Penn v. Standard Life Ins. Co., 76 S. E. 262, 160 N. C. 399, 42 L. R. A. (N. S.) 597, dismissing petition for rehearing Same v. Standard Life & Accident Ins. Co., 73 S. E. 99, 153 N. C. 29, 42 L. R. A. (N. S.) 593; Continental Casualty Co. v. Wade, 101 Tex. 102, 105 S. W. 35, reversing (Tex. Civ. App.) 99 S. W. 877; Furry's Adm'r v. General Acc. Ins. Co., 68 Atl. 655, 80 Vt. 526, 15 L. R. A. (N. S.) 206, 130 Am. St. Rep. 1012, 13 Ann. Cas. 515; North British & Mercantile Ins. Co. v. Robinett & Green, 112 Va. 754, 72 S. E. 668; Green v. National Casualty Co., 87 Wash. 237, 151 Pac. 509.

So, too, an insurer's obligation to insure against other risks than those expressly stated in the policy cannot be implied from the nature of the transaction; since the law will not imply a promise or obligation of a person repugnant to his own express declaration (O'Connor v. Columbia Ins. Co., 169 Mo. App. 150, 152 S. W. 396).

638-639. (g) Language of policy in general

638 (g). The general rule is that the language of the policy must be construed according to its plain, ordinary, and popular sense, unless by some known usage it has acquired a different and technical meaning.

Reference may be made to Maryland Casualty Co. v. Finch, 147 Fed. 388, 77 C. C. A. 566, 8 L. R. A. (N. S.) 308; Standard Life & Accident Ins. Co. of Detroit, Mich., v. McNulty, 157 Fed. 224, 85 C. C. A. 22; Williamsburgh City Fire Ins. Co. of Brooklyn v. Willard, 164 Fed. 404, 90 C. C. A. 392, 21 L. R. A. (N. S.) 103; McKinney v. General Accident Fire & Life Assur. Co., 211 Fed. 951, 128 C. C. A. 449; Canton Ins. Office v. Independent Transp. Co., 217 Fed. 213, 133 C. C. A. 207, L. R. A. 1915C, 408; Liverpool & London & Globe Ins. Co. v. Lavine, 59 South. 336, 5 Ala. App. 392; Empire Life Ins. Co. v. Gee, 178 Ala. 492, 60 South. 90; Arkansas Ins. Co. v. McManus, 86 Ark. 115, 110 S. W. 797; Blume v. Pittsburgh Life & Trust Co., 183 Ill. App. 295, judgment affirmed Same v. Pittsburgh Life & Trust Co., 104 N. E. 1031, 263 Ill. 160, 51 L. R. A. (N. S.) 1044, Ann. Cas. 1915C, 505; Palatine Ins. Co., Limited, of Manchester, Eng., v. O'Brien, 107 Md. 341, 68 Atl. 484, 16 L. R. A. (N. S.) 1055; Hatch v. United States Casualty Co., 197 Mass. 101, 83 N. E. 398, 14 L. R. A. (N. S.) 503, 125 Am. St. Rep. 332, 14 Ann. Cas. 290; Belle v. Travelers' Protective Ass'n of America, 135 Mo. App. 629, 135 S. W. 497; F. E. & J. L. Thorp v. Aetna Ins. Co., 72 Atl. 690, 75 N. H. 251; Sasse v. Order of United Commercial Trav-

elers of America, 154 N. Y. Supp. 558, 168 App. Div. 746; *Weil v. Globe Indemnity Co.*, 179 App. Div. 166, 166 N. Y. Supp. 225; *French v. Fidelity & Casualty Co. of New York*, 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011; *Wisconsin Zinc Co. v. Fidelity & Deposit Co. of Maryland*, 162 Wis. 39, 155 N. W. 1081.

The intention of the parties is to be obtained first from the language of the entire policy in connection with the risk or subject-matter (*Dodge v. Grain Shippers' Mut. Fire Ins. Ass'n*, 176 Iowa, 316, 157 N. W. 955).

Clauses in policy of title insurance must be construed in view of subject-matter insured, and if its general language does not apply or becomes meaningless or inoperative, it will be ignored in determining the liability of parties (*Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Central Trust & Savings Co.*, 255 Pa. 322, 99 Atl. 910).

639-640. (h) Printed and written portions of policy

639 (h). If there is a contradiction between the printed and the written portions of the policy the latter must control.

Fireman's Fund Ins. Co. v. Globe Nav. Co., 236 Fed. 618, 149 C. C. A. 614; *Royal Exch. Assur. v. Graham & Morton Transp. Co.*, 166 Fed. 32, 92 C. C. A. 66; *Gropper v. Home Ins. Co.*, 77 Misc. Rep. 132, 135 N. Y. Supp. 1028; *Bertine v. North River Ins. Co.*, 99 Misc. Rep. 297, 165 N. Y. Supp. 567.

A rider, by its provision, prevailing over the suspension clause of a fire policy, and the written part of the rider over the printed part, by provision of Civ. Code Cal. § 1651, the written part, providing for use of the building as an "auto repair shop," permitted gasoline to be there as usual and necessary to conduct of such a shop (*O'Neill v. Caledonian Ins. Co. of Edinburgh, Scotland*, 166 Cal. 310, 135 Pac. 1121).

640-642. (i) Marginal writings, indorsements, slips, and riders

640 (i). Where a policy states that the insurance effected thereby is "subject to conditions as in margin," a stipulation in the margin, which is the only part of the contract, which states the risks insured against, is a part of the policy, and is controlling (*O'Connor v. Columbia Ins. Co.*, 169 Mo. App. 150, 152 S. W. 396).

Effect on abandonment clause of provision written on margin of marine policy on a vessel, see *Fireman's Fund Ins. Co. v. Globe Nav. Co.*, 236 Fed. 618, 149 C. C. A. 614.

641 (i). Stipulations indorsed on the back of the policy, if sufficiently referred to in the body of the instrument, are part of the contract and to be construed with it.

Frankfort Marine Accident & Plate Glass Ins. Co. v. California Artistic Metal & Wire Co., 28 Cal. App. 74, 151 Pac. 176; **Bass v. Life & Annuity Ass'n**, 96 Kan. 205, 150 Pac. 588, judgment affirmed on rehearing 96 Kan. 398, 151 Pac. 1117; **Taylor v. Loyal Protective Ins. Co. (Mo. App.)** 194 S. W. 1055; **Penn Mut. Life Ins. Co. v. Gordon**, 104 Miss. 270, 61 South. 311; **Burbank v. Pioneer Mut. Ins. Ass'n**, 60 Wash. 253, 110 Pac. 1005, Ann. Cas. 1912B, 762.

But such an indorsement must be considered in the light of the purpose actuating the parties (**Atlas Reduction Co. v. New Zealand Ins. Co.**, 138 Fed. 497, 71 C. C. A. 21, 9 L. R. A. [N. S.] 433, reversing [C. C.] 121 Fed. 929). If it is susceptible of two constructions, it will be construed most strongly against the insurer (**Insurance Co. of North America v. De Loach & Co.**, 61 S. E. 406, 3 Ga. App. 807). It must be construed in connection with the face of the instrument (**Smoot v. Bankers' Life Ass'n**, 138 Mo. App. 438, 120 S. W. 719), and, if inconsistent therewith, cannot control (**Knott v. Security Mut. Life Ins. Co.**, 161 Mo. App. 579, 144 S. W. 178).

On the other hand, unless there is a sufficient reference in the body of the policy, matter on the back thereof is not so incorporated in the contract as to become a part thereof.

Reference may be made to **Dakan v. Union Mut. Life Ins. Co.**, 125 Mo. App. 451, 102 S. W. 634; **Gibson v. State Mut. Life Assur. Co. of Worcester, Mass.**, 184 Mo. App. 656, 171 S. W. 979; **White v. Empire State Degree of Honor**, 47 Pa. Super. Ct. 52; **Burbank v. Pioneer Mut. Ins. Ass'n**, 60 Wash. 253, 110 Pac. 1005, Ann. Cas. 1912B, 762.

So a printed indorsement on the back of a policy as to the nature of the insurance is not part thereof, and it is not to be presumed insured relied thereon rather than on his contract (**Hill v. Travelers' Ins. Co.**, 146 Iowa, 133, 124 N. W. 898, 28 L. R. A. [N. S.] 742). A clause limiting liability in case of suicide to the premiums paid is made a part of the policy by a provision that agreements, benefits, and privileges stated on subsequent pages were made a part of the contract (**Grell v. Sam Houston Life Ins. Co. [Tex. Civ. App.]** 157 S. W. 757). But the words "Policy written and premium payable semiannually," which were not printed in the original form of the application for life insurance, but were evidently stamped upon it

by the company after the policy had been written, were without effect to render the contract embodied in the policy and application ambiguous (*New York Life Ins. Co. v. Franklin*, 118 Va. 418, 87 S. E. 584).

642 (i). A slip of paper containing a stipulation is not a part of an insurance policy merely because pinned thereon (*Co-operative Ins. Ass'n of San Angelo v. Ray* [Tex. Civ. App.] 138 S. W. 1122). And the mere fact of the fastening of a slip to a policy cannot make it a part of the contract, where there is no reference on either policy or slip from one to the other (*Williams v. New York Life Ins. Co.*, 89 Atl. 97, 122 Md. 141). But a rider, properly attached to a policy, modifying or explaining its provisions, will be considered part of the contract and given due effect in the construction of the policy.

Scharles v. N. Hubbard, Jr., & Co., 131 N. Y. Supp. 848, 74 Misc. Rep. 72; *Lancaster v. Southern Ins. Co.*, 69 S. E. 214, 153 N. C. 285, 138 Am. St. Rep. 665.

Moreover, the rider, if inconsistent with the printed portions of the policy, will usually control.

This rule seems to be supported by *New York & P. R. S. S. Co. v. Ætna Ins. Co.* (D. C.) 192 Fed. 212; *Royal Exch. Assur. v. Graham & Morton Transp. Co.*, 166 Fed. 32, 92 C. C. A. 66; *King v. Concordia Fire Ins. Co.*, 140 Mich. 258, 103 N. W. 616, 6 Ann. Cas. 87; *Bolte & Jansen v. Equitable Fire Ass'n*, 23 S. D. 240, 121 N. W. 773; *Morris & Co. v. Rhode Island Ins. Co. of Providence*, 181 Ill. App. 500; *Lambert v. Security Mut. Fire Ins. Co.*, 58 Pa. Super. Ct. 624. But see *American Credit Indemnity Co. of New York v. Henry A. Hitner's Sons Co.*, 228 Fed. 654, 143 C. C. A. 176.

So, where a rider attached to a policy of marine insurance provided that the terms and conditions of that form were to be substituted for those of the policy, and that the latter were thereby waived, the terms of the contract must be drawn from the rider (*Plummer v. Insurance Co. of North America*, 95 Atl. 605, 114 Me. 128). The effect of a rider, attached by the insurer to a marine insurance policy, containing a clause that "the terms and conditions of this form are to be regarded as substituted for those of the policy to which it is attached, the latter being hereby waived," is to displace all the terms of the policy, leaving only the formal parts, and substitute those of the rider (*New York & P. R. S. S. Co. v. Ætna Ins. Co.*, 204 Fed. 255, 122 C. C. A. 523, affirming decree [D. C.] 192 Fed. 212). But where insured prepared an elaborate rider

describing the property intended to be covered, which was attached to the policy, such rider should not be expanded as against the insurer beyond its plain and ordinary meaning, on the theory that the policy should be interpreted against the insurer (*Globe & Rutgers Fire Ins. Co. of New York v. David Moffat Co.*, 154 Fed. 13, 83 C. C. A. 91).

642-643. (j) General and specific conditions or exceptions

643 (j). Where there are two inconsistent stipulations covering the same subject-matter, the one general and the other separate and distinct, the latter stipulation will govern, because specific (*Rose v. Mutual Life Ins. Co.*, 144 Ill. App. 434, affirmed in 240 Ill. 45, 88 N. E. 204). But if provisions in accident policy for indemnity for total and partial incapacity are antagonistic to following provisions for indemnity for specific total loss, former govern (*Lemaitre v. National Casualty Co.*, 195 Mo. App. 599, 186 S. W. 964).

A general printed condition in a fire insurance policy which stated: "This policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership," is qualified by a special provision covering property held by the insured "in trust or on commission." *Sloan v. Boston Ins. Co.*, 186 Ill. App. 81; *Same v. Queen Ins. Co. of America*, Id. 82.

Words of exception in a policy, if doubtful in meaning, are to be construed most strongly against the party for whose benefit they are intended.

Thames & Mersey Marine Ins. Co. v. Pacific Creosoting Co., 223 Fed. 561, 139 C. C. A. 101, affirming decree *Pacific Creosoting Co. v. Thames & Mersey Marine Ins. Co.* (D. C.) 210 Fed. 958; *Farmers' Mut. Equity Ins. Society v. Smith*, 165 S. W. 675, 158 Ky. 459, L. R. A. 1915B, 844; *Montgomery v. Southern Mut. Ins. Co.*, 88 Atl. 924, 242 Pa. 86, 51 L. R. A. (N. S.) 518.

Exceptions contained in a distinct clause limiting the general clause need not be pleaded by plaintiff. *Ætna Life Ins. Co. v. Rustin*, 151 S. W. 366, 151 Ky. 103, rehearing denied 153 S. W. 14, 152 Ky. 42.

643-644. (k) Construction by the parties

643 (k). The practical interpretation or construction of the contract by the parties themselves will usually be given effect in a construction by the court.

Fire Ass'n of Philadelphia v. Taylor, 76 Kan. 392, 91 Pac. 1070; *Slavik v. Supreme Lodge of All Bohemian Ladies' Aid Societies*, 59 Misc. Rep. 183, 110 N. Y. Supp. 347.

So, if the insured and the officers of the insurer have acted with reference to a policy so as to indicate an understanding as to the effect and intent of its provisions, such understanding will have a persuasive effect in the construction of the policy (*Haynes v. Masonic Ben. Ass'n*, 98 Ark. 421, 136 S. W. 187, Ann. Cas. 1912D, 697). So an agreement by the parties as to the construction to be given to the policy, not in contravention of law or public policy or the language of the policy, that it should lapse under certain circumstances, which occurred, will be adopted by the court (*Candelaria v. Columbian Nat. Life Ins. Co.*, 60 Colo. 340, 153 Pac. 447). And where both the insurer and the insured have by their acts and conduct indicated that they considered the policy as having lapsed, the court will adopt the construction placed upon the contract by the parties themselves (*Missouri State Life Ins. Co. v. Hill*, 109 Ark. 17, 159 S. W. 31).

Where a policy of employers' indemnity insurance provides that, in case the pay roll during the term shall exceed or be less than the amount as estimated at the time of the application, the proportionate sum shall be paid by the insured as an additional premium or refunded to him as the case may be, the insured, after adopting the construction placed upon the policy by the insurer, when adjustments were made, submitting statements of what purported to be the total wages, and either paying the additional premiums or receiving rebates called for, cannot assert that the contract is uncertain and ambiguous (*Employers' Liability Assur. Corp., Limited, of London, England, v. Kelly-Atkinson Const. Co.*, 182 Ill. App. 372). A refusal of insured to exhibit its books to allow plaintiff insurance company to determine the amount of premiums due is a construction that the policies covered all of defendant's employes (*Frankfort Marine Accident & Plate Glass Ins. Co. v. California Artistic Metal & Wire Co.*, 28 Cal. App. 74, 151 Pac. 176).

Where insured claimed no knowledge of rider attached to his credit policy, there is no room for practical construction by the parties' acts. *Knobel v. London Guarantee & Accident Co.* (Sup.) 163 N. Y. Supp. 977.

Where reasonable doubt exists as to meaning of insurance contract, the construction that will carry out the insured's understanding should be adopted, where his understanding is based upon representations made by company (*Forman v. Mutual Life Ins. Co.*, 191 S. W. 279, 173 Ky. 547). But a construction put on the terms

of a policy by the usage and custom of the insurer only will not control, in the absence of anything to show that such construction had been brought to the knowledge of the insured (*Supreme Council Catholic Benev. Legion v. Grove*, 176 Ind. 356, 96 N. E. 159, 36 L. R. A. [N. S.] 913).

While agents of life insurance companies cannot waive or alter clear provisions of policies, their acts and representations may be considered as to companies' interpretation of policies (*Foryciarz v. Prudential Ins. Co.*, 158 N. Y. Supp. 834, 95 Misc. Rep. 306).

644-645. (l) Effect of prior decisions

644 (l). As the terms employed in the statutory form of standard policy have been in previous use in insurance contracts and judicially construed, it will be assumed that the terms are used in view of such previous interpretation (*Dunton v. Westchester Fire Ins. Co.*, 104 Me. 372, 71 Atl. 1037, 20 L. R. A. [N. S.] 1058). And to the same effect is *Shawnee Mut. Fire Ins. Co. v. School Board of School Dist. No. 31, Grady County*, 44 Okl. 3, 143 Pac. 194.

Where an insurer doing a nation-wide business employs terms which have become the subject of seriously conflicting judicial interpretations, it adopts that construction most beneficial to the insured (*Schmohl v. Travelers' Ins. Co.* [Mo. App.] 177 S. W. 1108).

645-646. (m) Evidence to aid construction

645 (m). Where the proper construction of an accident insurance policy is not free from doubt, recourse may be had to the preliminary negotiations between the parties to determine the correct construction (*Mather v. London Guarantee & Accident Co.*, 125 Minn. 186, 145 N. W. 963). The intention determines the sense of the terms used in a policy, and if clearly expressed, resort may not be had to the circumstances (*Still v. Connecticut Fire Ins. Co. of Hartford, Conn.*, 185 Mo. App. 550, 172 S. W. 625).

Manual of hazards referred to in accident policy is admissible as part of the contract. *Green v. National Casualty Co.*, 87 Wash. 237, 151 Pac. 509.

2. WHAT LAW GOVERNS IN THE CONSTRUCTION OF THE CONTRACT

649-650. (a) Construction determined by the law of the place where the contract was made

649 (a). The general rule is that the construction of contracts of insurance is governed by the law of the place where the contract was made.

Northwestern S. S. Co. v. Maritime Ins. Co. (C. C.) 161 Fed. 166; *Royal Union Mut. Life Ins. Co. v. Wynn (C. C.)* 177 Fed. 289; *Mutual Life Ins. Co. of New York v. Devine*, 180 Ill. App. 422; *Wilde v. Wilde*, 209 Mass. 205, 95 N. E. 295; *Boston Ice Co. v. Boston & M. R. R.*, 77 N. H. 6, 86 Atl. 356, 45 L. R. A. (N. S.) 835, Ann. Cas. 1914A, 1090; *Green v. Supreme Council of Royal Arcanum (Sup.)* 124 N. Y. Supp. 398; *J. W. Matthews & Co. v. Employers' Liability Assur. Corp.*, 127 App. Div. 195, 111 N. Y. Supp. 76, affirmed in 195 N. Y. 593, 89 N. E. 1102; *Dixie Fire Ins. Co. v. American Bonding Co.*, 162 N. C. 384, 78 S. E. 430.

The Missouri statute (Rev. St. 1909, § 6945) relating to suicide as a defense, in action on insurance policy, does not apply to Canadian contract sued upon in this state. *Grey v. Independent Order of Foresters (Mo. App.)* 196 S. W. 779.

In determining liability under Maryland contract of insurance, courts of foreign state will, where Maryland courts have not passed on matter, apply general law, though as to matters passed on by Maryland courts, Maryland decisions govern (*Cohen v. Home Ins. Co. [Del. Super.]* 97 Atl. 1014).

650-652. (b) Exceptions to the rule—Law of place of performance—Law of domicile of insurer

650 (b). As to matters connected with its performance, the construction of the contract will be determined by the law of the place where the contract is to be performed.

Globe & Rutgers Fire Ins. Co. v. David Moffat Co., 154 Fed. 13, 83 C. C. A. 91; *Progresso S. S. Co. v. St. Paul Fire & Marine Ins. Co.*, 79 Pac. 967, 146 Cal. 279; *Flittner v. Equitable Life Assur. Soc. of the United States*, 157 Pac. 630, 30 Cal. App. 209; *Allemannia Fire Ins. Co. of Pittsburg v. Fireman's Ins. Co. of Baltimore*, 28 App. D. C. 330, 14 L. R. A. (N. S.) 1049; *Missouri State Life Ins. Co. v. Lovelace*, 58 S. E. 93, 1 Ga. App. 446; *Brunswick v. Standard Acc. Ins. Co. of Detroit, Mich.*, 195 Mo. App. 651, 187 S. W. 802; *McGowin v. Menken*, 177 App. Div. 841, 164 N. Y. Supp. 953; *In re Peckham*, 29 R. I. 250, 69 Atl. 1002, 132 Am. St.

Rep. 818. In *Green v. Supreme Council of Royal Arcanum* (Sup.) 124 N. Y. Supp. 398, stress was laid on the place of performance, but the contract was made in New York and to be performed there as well.

652 (b). In some cases, where fundamental and primary rights of the parties, dependent on the powers of the insurer, have been involved, the law of the insurer's domicile has been applied.

Reference may be made to the following cases: *Franklin Life Ins. Co. v. Morrell*, 106 S. W. 680, 84 Ark. 511; *Supreme Lodge, New England Order of Protection, v. Hine*, 73 Atl. 791, 82 Conn. 315; *Valleroy v. Knights of Columbus*, 116 S. W. 1130, 135 Mo. App. 574; *Equitable Life Assur. Society of United States v. Well*, 103 Miss. 186, 60 South. 133, Ann. Cas. 1915B, 636. And see *Standard Leather Co. v. Mercantile Town Mut. Ins. Co.*, 111 S. W. 631, 131 Mo. App. 701.

652-653. (c) Intent of parties—Effect of stipulation

652 (c). The intent of the parties may be a controlling factor in determining what law governs. This intent may be gathered from the circumstances surrounding the contract. Thus, where plaintiff, a British subject, took out in England an accident policy in defendant a British company, covering accidents in Europe, the United States, and Southern Canada, it was governed by the laws of Great Britain (*Wilson v. Central Ins. Co., Limited*, 119 N. Y. Supp. 955, 135 App. Div. 649).

653 (c). This intent may be manifested by stipulations in the policy, and if there are such stipulations they will usually be given effect, other things being equal (*Russell v. Grigsby*, 168 Fed. 577, 94 C. C. A. 61). It was held in *Michaelsen v. Security Life Ins. Co.* (C. C.) 150 Fed. 224, that if a life insurance policy is made payable at the principal office of the company, and expressly provides that the contract shall be subject to and governed by the laws of the state in which such office is located, the remedy of the insured, in case of an anticipatory breach of the contract by the company, is governed by the laws of such state, wherever suit for its enforcement may be brought. A contrary rule has been announced in Texas (*Washington Life Ins. Co. v. Lovejoy* [Tex. Civ. App.] 149 S. W. 398).

Under policy applied for and delivered in Minnesota, providing for a cash loan on request on security of policy, a policy loan agreement, made six years thereafter, was a separate contract, and,

where expressly so declared therein, was governed by laws of state of New York, where insurer's home office was located (*New York Life Ins. Co. v. Scheuer* [Ala.] 73 South. 409).

654. (d) General rules and stipulations controlled by considerations of public policy

654 (d). The rules that the construction of the contract will be governed by the law of the place of contract, or the law stipulated for in the policy, must yield, however, to considerations of public policy of the state where the subject-matter of the contract is situated and where enforcement is sought.

Federal Union Surety Co. v. Flemister, 95 Ark. 389, 130 S. W. 574; *Haven v. Home Ins. Co.*, 149 Mo. App. 291, 130 S. W. 73; *Fidelity Mut. Life Ins. Co. v. Miazza*, 93 Miss. 18, 46 South. 817, 136 Am. St. Rep. 534.

655-657. (f) What is the place of contract—Place of final assent

656 (f). If the parties to an insurance contract are in different jurisdictions, the place where the last act is done necessary to complete the contract is the place of contract (*McElroy v. Metropolitan Life Ins. Co.*, 84 Neb. 866, 122 N. W. 27, 23 L. R. A. [N. S.] 968, 19 Ann. Cas. 28). But an allegation that the policy in suit was issued in New Jersey is not an allegation that it is a New Jersey contract (*Prudential Life Ins. Co. v. Fusco's Adm'r*, 145 Ky. 378, 140 S. W. 566).

657-659. (g) Same—Place of delivery and payment of premium

658 (g). In the absence of any act or stipulation of the parties indicating a different intent, the place of contract is the place of delivery and payment of the premium.

Northwestern Mut. Life Ins. Co. v. McCue, 32 Sup. Ct. 220, 223 U. S. 234, 56 L. Ed. 419, 38 L. R. A. (N. S.) 57, reversing judgment *McCue v. Northwestern Mut. Life Ins. Co.*, 167 Fed. 435, 98 C. C. A. 71; *Rose v. Mutual Life Ins. Co.*, 144 Ill. App. 434, judgment affirmed 240 Ill. 45, 88 N. E. 204; *Ingersoll v. Mutual Life Ins. Co. of New York*, 156 Ill. App. 568; *Hamilton v. Darley*, 266 Ill. 542, 107 N. E. 798; *City of Shreveport v. New York Life Ins. Co.*, 141 La. 360, 75 South. 80; *Wilde v. Wilde*, 95 N. E. 295, 209 Mass. 205; *Whittaker v. Mutual Life Ins. Co. of New York*, 114 S. W. 53, 133 Mo. App. 664; *Umberger v. Modern Brotherhood of America*, 162 Mo. App. 141, 144 S. W. 898; *Crohn v. Order of United Commercial Travelers of America*, 156 S. W. 472, 170 Mo. App. 273;

Coscarella v. Metropolitan Life Ins. Co., 175 Mo. App. 130, 157 S. W. 873; *Lange v. New York Life Ins. Co.*, 162 S. W. 589, 254 Mo. 488; *Schuler v. Metropolitan Life Ins. Co.*, 191 Mo. App. 52, 176 S. W. 274; *Pringle v. Modern Woodmen of America*, 87 Neb. 548, 127 N. W. 876; *Haas v. Mutual Life Ins. Co. of New York*, 134 N. W. 937, 90 Neb. 808, Ann. Cas. 1913B, 919; *Mees v. Pittsburgh Life & Trust Co.*, 154 N. Y. Supp. 660, 169 App. Div. 86; *Continental Casualty Co. v. Owen*, 38 Okl. 107, 131 Pac. 1084.

So, a policy of insurance on an American vessel issued in England, and there delivered to brokers who paid the premium, is an English contract, to be construed and enforced according to English law (*Northwestern S. S. Co. v. Maritime Ins. Co.* [C. C.] 161 Fed. 166). As depositing the policy in the mail may under certain circumstances constitute a delivery, it has been held that where plaintiff paid the first premium on a life insurance policy when applying therefor in Kentucky, and the terms of the policy were agreed upon and the application was accepted by the company in New York, and the policy mailed there to its agent in Kentucky for unconditional delivery to plaintiff, the contract was completed when the policy was mailed and hence was governed by the laws of New York (*Equitable Life Assur. Soc. of United States v. Perkins*, 41 Ind. App. 183, 80 N. E. 682). Where an application for insurance is made in one state, forwarded to another, and the policy written and mailed there, it is a contract of the latter state and governed by its laws (*Travelers' Protective Ass'n of America v. Smith* [Ind.] 101 N. E. 817).

660. (h) Same—Countersigning by agent

660 (h). The countersigning of the policy by the agent may be the last act necessary to complete the contract. So it was held in *Orient Ins. Co. v. Rudolph*, 69 N. J. Eq. 570, 61 Atl. 26, that, where property insured was located in the state of New York and the policy contained the express provision that it should not be valid until countersigned by the agent of the company in the state of New York, the company being a corporation of Connecticut, and when it was so countersigned it was mailed to the insured at his residence in Jersey City, the insurance contract was a New York contract and governed by its laws as to its construction, and discharge.

Where fire policy is delivered and countersigned by agent in state of Maryland, Maryland law governs. *Cohen v. Home Ins. Co.* (Del. Super.) 97 Atl. 1014.

660-661. (1) Same—Stipulation of parties—Statutory provisions

660 (i). In the absence of any objection based on considerations of public policy or express statutory provision, the parties may stipulate that a certain state shall be deemed the place of contract.

Burns v. Burns, 190 N. Y. 211, 82 N. E. 1107, affirming 109 App. Div. 98, 95 N. Y. Supp. 797; *Polk v. Mutual Reserve Fund Life Ass'n* (C. C.) 137 Fed. 273; *Williams v. New York Life Ins. Co.*, 89 Atl. 97, 122 Md. 141.

A life certificate having provided that it should be construed in accordance with the laws of Pennsylvania, the question whether false answers to questions in the application constituted a defense depended on the statute of that state (Act June 23, 1885 [P. L. 134]), as construed by the Pennsylvania Supreme Court (*Grand Fraternity v. Keatley*, 4 Boyce [Del.] 308, 88 Atl. 553, reversing judgment 82 Atl. 294, 2 Boyce, 511).

3. PAPERS ACCOMPANYING POLICY OR CONSTRUED THEREWITH IN GENERAL**662-663. (a) In general**

662 (a). In accordance with the general principles that two or more instruments executed contemporaneously by the same parties with reference to the same subject-matter, constitute one contract, it has been held that where a marine policy consisted of three papers, namely: First, the regulation form containing in the place for descriptions of the voyage, etc., the words, "as per form attached"; second, the printed form of the agents, containing the usual clauses of a marine policy, which were "substituted for those of the policy to which it is attached"; and, third, a typewritten paper attached to the agents' form containing the more intimate agreements conforming the policy to the circumstances—the policy consisted of all three papers and not the typewritten paper alone (*Kuh v. British America Assur. Co.*, 112 N. Y. Supp. 410, 59 Misc. Rep. 589, judgment reversed 130 App. Div. 38, 114 N. Y. Supp. 268). So, where a policy indemnifying a contractor against loss for injuries to employes had attached to it an agreement whereby the policy was extended to cover the liability of the contractor to the public for personal injuries, the papers must be construed together as constituting one contract (*Creem v. Fidelity & Casualty Co.* of

New York, 141 App. Div. 493, 126 N. Y. Supp. 555). So, where a 20-payment insurance policy is issued in 1899, on which the payment period expires in 1909 as if it had been issued in 1889, and a loan certificate is executed by the insured and accepted by the company to make up for the first ten payments which are not made, the policy and the loan certificate constitute one contract when both are executed and delivered at the same time (*James v. Franklin Life Ins. Co.*, 180 Ill. App. 632). And though a policy insuring an employer against liability for accidents to his employes is executed on a date prior to an employment contract, the two contracts will be construed together in determining the insurer's liability in case of injury to the employé (*Bass v. Occidental Life Ins. Co.*, 19 N. M. 193, 142 Pac. 798).

A paper containing an iron-safe clause inclosed in the envelope, in which policy on stock of goods, etc., was sent to insured, is no part of policy. *Merchants' & Bankers' Fire Underwriters v. Brooks* (Tex. Civ. App.) 188 S. W. 243.

Where the company in which plaintiff was originally insured transferred its policies and business to another company, and the latter company sent insured a written notice of the contract of transfer between the companies, with directions to attach it as a rider to his policy, when so attached, it, together with the old policy, constituted insured's policy (*Mutual Reserve Life Ins. Co. v. Ross*, 42 Ind. App. 621, 86 N. E. 506). Similarly, where insured accepted a certificate from an indemnity company, stating that the company bound itself as set forth in a certain contract of reinsurance between it and the order in which insured had his policy, such contract of reinsurance became a part of the contract between the insured and the indemnity company (*Spande v. Western Life Indemnity Co.*, 61 Or. 220, 122 Pac. 38, affirming judgment on rehearing 61 Or. 220, 117 Pac. 973).

In *Timlin v. Equitable Life Assur. Society of the United States*, 141 Wis. 276, 124 N. W. 253, the life policy contained a printed provision that, on the completion of the tontine dividend period, insured might continue the policy for the original amount and apply the dividend to the purchase of an annuity. Attached to such policy by a pin was a sheet of paper, partly printed and partly written, reciting, "These estimates are the authorized figures," followed by a statement that, at the end of the tontine period, insured might take a life annuity beginning at a specified sum. It was held

that the papers, taken together, constituted the contract, and that the insured was entitled to an annuity amounting to the sum stated in such attached paper. On the other hand, in *Untermeyer v. Mutual Life Ins. Co.*, 128 App. Div. 615, 113 N. Y. Supp. 221, an endowment policy providing for an apportionment at the end of the endowment period and that the full reserve would then be computed, with 4 per cent. interest, and the surplus applied to the policy as then determined, also declared that no agent had power to make or modify the contract by any promise or representation not contained in the application. The agent, however, delivered with the policy one of the company's blanks over his signature containing certain statements as to the amount of the reserve and estimated surplus, and reciting that a paid-up participating policy would be issued at the end of the period for a specified amount. It was held that the instrument delivered by the agent was a mere statement of expectation, and not a part of the contract enforceable against the company.

In accordance with the general rule, it has been held that, where a merchant applied for a credit bond and the application referred to a certain schedule, designated "Schedule A," such schedule became part of the contract (*Lexington Grocery Co. v. Philadelphia Casualty Co.*, 157 N. C. 116, 72 S. E. 870). Where an application for a policy of life insurance and also an application for a special agent's contract were executed by the applicant on the same day, and in order to make the appointment as special agent effective certain terms as to the payment of premiums were imposed on the applicant, the two contracts, though separate in form, must be considered together, to determine the character of the transaction (*Urwan v. Northwestern Nat. Life Ins. Co.*, 125 Wis. 349, 103 N. W. 1102).

Ky. St. 1903, § 656, prohibiting an insurer from making any contract of insurance other than such as is expressed in the policy, does not apply to a note given by an insured for money borrowed thereon pursuant to the provisions of the policy (*Jagoe v. Aetna Life Ins. Co.*, 123 Ky. 510, 96 S. W. 598, 29 Ky. Law Rep. 984).

663 (a). While it is true that generally the accompanying paper must be referred to in the policy, in order that it may be construed with it, the fact that there is such a reference does not necessarily incorporate the paper for all purposes. Thus in *Edwards v. American Patriots*, 162 Mo. App. 231, 144 S. W. 1117, it was said

that reference to a contract of consolidation between two fraternal insurance companies cannot incorporate into a certificate of assumption, issued to a former member, the terms thereof, except by direct reference, and then only for the purpose to which it refers.

Where a written "illustration" of the surplus plaintiff would receive upon his life policy was officially attested in same handwriting as policy, as an inducement to his taking it, and was pasted to policy when plaintiff received it, it was intended as and was a part of the contract (*Forman v. Mutual Life Ins. Co.*, 191 S. W. 279, 173 Ky. 547).

663-665. (b) Premium notes

663 (b). A policy of insurance and the notes given for premiums thereon, being executed contemporaneously and relating to the same parties and the same subject-matter, are parts of the same contract, and should be considered together in ascertaining the terms of such contract.

Fidelity Mut. Life Ins. Co. v. Bussell, 75 Ark. 25, 86 S. W. 814; *Marshall v. Missouri State Life Ins. Co.*, 148 Mo. App. 669, 129 S. W. 40; *North American Accident Ins. Co. v. Bowen* (Tex. Civ. App.) 102 S. W. 163.

664 (b). Similarly the premium note given on a mutual fire policy, though neither copied in full into the policy nor in any way attached thereto, is nevertheless a part of the contract, in view of the provisions of Rev. St. Me. 1903, c. 49, § 30 (*Russell v. Oxford County Patrons of Husbandry Mut. Fire Ins. Co.*, 107 Me. 362, 78 Atl. 459). It has also been held that a duebill attached to an insurance policy and executed at the same time constitutes a part of the contract (*Globe Mut. Life Ins. Ass'n v. Meyer*, 118 Ill. App. 155).

665-669. (c) Prospectus or other pamphlet

665 (c). In *Langdon v. Northwestern Mut. Life Ins. Co.*, 116 App. Div. 558, 101 N. Y. Supp. 914, an agent, in soliciting a policy, delivered to the applicant a writing containing a statement of the great results which might happen in case insurance in the defendant company was taken out; one of the statements being that the policy would return double the annual cash dividend of any other company writing that kind of a policy. It was held that the written representation was a mere prospectus, and not a part of the contract, so as to charge an insurer with liability to pay the esti-

mated dividends. With this case, however, should be compared the case of *Untermeyer v. Mutual Life Ins. Co.*, 128 App. Div. 615, 113 N. Y. Supp. 221.

A pamphlet sent out by agents of an insurance company, making representations as to the plans upon which it insures, is to be regarded as part of the contract of insurance entered into upon the faith of the representations and is to be considered in connection with the policy in determining what the contract was (*Laib v. Fraternal Reserve Life Ass'n*, 177 Ill. App. 72).

675-676. (g) Published rules and by-laws

675 (g). To make the "manual" of an accident insurance company, defining the classifications of risks, occupations, etc., a part of the contract, it should have been plainly referred to therein and made a part thereof, or should have been actually written into the contract (*Miller v. Missouri State Life Ins. Co.*, 153 S. W. 1080, 168 Mo. App. 330).

In an action on an accident policy, Hurd's Rev. St. 1912, c. 73, § 208u, cl. 3, providing that a life policy and the application shall constitute the entire contract between the parties, and section 209, providing that accident policies shall state on their face the agreement, do not apply in determining whether the manual of the insurance company may be looked to in ascertaining the amount of indemnity that is to be the basis of liability. *McCarthy v. Pacific Mut. Life Ins. Co.*, 178 Ill. App. 502.

4. APPLICATION AS PART OF THE CONTRACT

676-678. (a) In general

677 (a). For the general purpose of construction, an application for insurance will be considered a part of the contract, if it is referred to in the policy in such a way as to indicate a clear intent to make it a part thereof.

This general principle is supported by the following cases: *Satterfield v. Fidelity Mut. Life Ins. Co.*, 171 Ala. 429, 55 South. 200; *Gill v. Manhattan Life Ins. Co.*, 11 Ariz. 232, 95 Pac. 89; *Fidelity Mut. Life Ins. Co. v. Bussell*, 86 S. W. 814, 75 Ark. 25; *Supreme Lodge, New England Order of Protection, v. Hine*, 73 Atl. 791, 82 Conn. 315; *Allen v. Phoenix Assur. Co.*, 95 Pac. 829, 14 Idaho, 728; *Enright v. National Council, Knights and Ladies of Security*, 97 N. E. 681, 253 Ill. 460, reversing judgment 161 Ill. App. 365; *Columbian Exposition Salvage Co. v. Union Casualty*

& Security Co., 123 Ill. App. 245, affirmed in 220 Ill. 172, 77 N. E. 128; Peckham v. Modern Woodmen, 151 Ill. App. 95; Kelly v. Metropolitan Life Ins. Co., 152 Ill. App. 179; Harvick v. Modern Woodmen of America, 158 Ill. App. 570; Quinn v. North American Union, 162 Ill. App. 319; Arrowsmith v. Old Colony Life Ins. Co., 164 Ill. App. 44; Dromgold v. Royal Neighbors of America, 103 N. E. 584, 261 Ill. 60, reversing judgment 177 Ill. App. 1; Supreme Lodge K. P. v. Graham, 49 Ind. App. 535, 97 N. E. 806; Sovereign Camp of Woodmen of the World v. Latham, 59 Ind. App. 290, 107 N. E. 749; Anchor Life Ins. Co. v. Meyer, 61 Ind. App. 35, 111 N. E. 436; Mutual Fire Ins. Co. of Montgomery County v. Ritter, 113 Md. 163, 77 Atl. 388; Paquette v. Prudential Ins. Co., 79 N. E. 250, 193 Mass. 215; Lee v. Prudential Life Ins. Co., 89 N. E. 529, 203 Mass. 299, 17 Ann. Cas. 286; Daffron v. Modern Woodmen of America, 190 Mo. App. 303, 178 S. W. 498; Thompson v. Thompson, 100 Miss. 869, 57 South. 291; Newman v. Supreme Lodge, Knights of Pythias, 110 Miss. 371, 70 South. 241, L. R. A. 1916C, 1051; Cilek v. New York Life Ins. Co., 97 Neb. 56, 149 N. W. 49, reversing judgment on rehearing 145 N. W. 693, 95 Neb. 274; Lexington Grocery Co. v. Philadelphia Casualty Co., 157 N. C. 116, 72 S. E. 870; North American Accident Ins. Co. v. Bowen (Tex. Civ. App.) 102 S. W. 163; Modern Woodmen of America v. Lynch (Tex. Civ. App.) 141 S. W. 1055; International Travelers' Ass'n v. Votaw (Tex. Civ. App.) 197 S. W. 237.

Thus, where a series of liability policies were issued, premiums on which were based on the wage roll of insured, and a schedule attached to the policy provided that the estimated pay roll covers the wages of all persons employed on the premises, including executive officers, office men, piece workers, drivers, and drivers' helpers, except as follows: President, vice president, secretary, treasurer, office men, drivers, and drivers' helpers—to determine what men were included in the policy for the purpose of premiums, resort might be had to the applications and daily reports as part of the contract to show that shopmen and not yardmen were included, since the schedule was obviously ambiguous (*Fidelity & Casualty Co. of New York v. Fayetteville Wagon, Wood & Lumber Co.*, 94 Ark. 90, 125 S. W. 653).

The "application" thus incorporated in a life policy by reference should be construed to include all the statements on both pages thereof, except the medical examiner's report (*Paquette v. Prudential Ins. Co. of America*, 193 Mass. 215, 79 N. E. 250). But it has been held in Illinois that the statements in answers to the questions of a medical examiner of an applicant for life insurance are a

part of the application, where the application is divided into two parts; part 1 containing among other things the family history, stipulations or what shall constitute the basis of the contract, and what shall constitute a forfeiture, part 2 being the medical examination, and the whole examination being entitled "application for beneficial certificate" (*Weisguth v. Supreme Tribe of Ben Hur*, 194 Ill. App. 17, judgment affirmed 112 N. E. 350, 272 Ill. 541).

678 (a). Where a policy is issued without any application therefor, the application made by the insured to another insurer several days thereafter cannot be considered in construing the first policy (*Connecticut Fire Ins. Co. v. Colorado Leasing Min. & Mill. Co.*, 50 Colo. 424, 116 Pac. 154, Ann. Cas. 1912C, 597). So, where an application addressed to a particular company was forwarded to an agent for the company addressed and for other companies, and he split the insurance, putting a portion of it in each company, the application was no part of the contract between the insured and the companies other than the one addressed therein (*Waukau Milling Co. v. Citizens' Mut. Fire Ins. Co.*, 130 Wis. 47, 109 N. W. 937, 118 Am. St. Rep. 998, 10 Ann. Cas. 795). If the execution of an application by insured was not a condition precedent to the policy taking effect, and assured did not agree to make an application after the policy was issued, an application subsequently executed by him is not a part of the contract of insurance so as to limit the company's liability; the policy itself fixing the rights of the parties (*Loyal Mut. Fire Ins. Co. v. J. S. Brown & Bro. Mercantile Co.*, 107 Pac. 1098, 47 Colo. 467). But where the policy sued on was issued by defendant company as a substitute for the policy issued by a company which it had absorbed and expressly recited that it was based on the application made to the latter company, which was made a part thereof, and the application was identified as the only one made for the policy, such application became a part of the contract with defendant company (*Maddox v. Southern Mut. Life Ins. Ass'n*, 65 S. E. 789, 6 Ga. App. 681).

In an action on a fire policy it was not reversible error to exclude from evidence the application for the original policy issued offered to show that the duplicate policy mistakenly described the property. *Citizens' Mut. Fire Ins. Co. of Cecil County v. Conowingo Bridge Co.*, 82 Atl. 372, 116 Md. 422.

It must clearly appear from the language of the policy that the parties intended to make the application a part of the contract, and

the application itself cannot be considered in determining the question (*Spence v. Central Accident Ins. Co.*, 236 Ill. 444, 86 N. E. 104, 19 L. R. A. [N. S.] 88).

As illustrating the converse of the general rule, it has been held in a few cases that an application cannot be considered as part of the policy, unless it is incorporated therein by a proper reference.

Manhattan Life Ins. Co. v. Verneville, 156 Ala. 592, 47 South. 72; *Breeden v. Western & Southern Life Ins. Co.*, 146 S. W. 1104, 148 Ky. 488. Under Insurance Law, § 58, requiring every policy to contain the entire contract, the unattached application is not a part of the contract, and breaches of warranties in the application cannot be relied on, in the absence of proof of fraud. *Cohen v. Metropolitan Life Ins. Co.*, 147 N. Y. Supp. 434, 85 Misc. Rep. 406.

It has, however, been held that an application for membership in a mutual benefit association may be incorporated in the contract of insurance subsequently entered into, if the constitution and by-laws of the association so provided (*Thompson v. Thompson*, 100 Miss. 869, 57 South. 291).

The rules stated apply to contracts of fidelity insurance (*National Surety Co. v. Stallo*, 156 N. Y. Supp. 988, 171 App. Div. 206), title insurance (*Broadway Realty Co. v. Lawyers' Title Ins. & Trust Co.*, 157 N. Y. Supp. 1088, 171 App. Div. 792, reversing judgment 154 N. Y. Supp. 1024, 91 Misc. Rep. 137), and employer's liability insurance (*Maryland Casualty Co. v. W. C. Robertson & Co.* [Tex. Civ. App.] 194 S. W. 1140).

678-681. (b) Statutory provisions requiring a copy of the application to be attached to the policy

678 (b). As stated in the original text, statutes have been adopted in several states, the general effect of which is to require a copy of the application to be attached to the policy.

In addition to the states mentioned in the original text, attention is called to the following:

The District of Columbia statute (Code of Law 1901, § 657; 32 Stat. 534, c. 1329) requires insurance companies to deliver with every policy issued a copy of the application made by the insured.

The Georgia statute (Civ. Code 1910, § 2471) provides that all life insurance policies which contain any reference to the application either as forming part of the policy or contract between the parties or having any bearing thereon shall contain, or have attached to the policy, a correct copy of the application.

The Minnesota statute (Gen. Laws 1895, c. 175, § 71) provides that life insurance policies containing a reference to the application must have attached thereto a copy of the application.

The New York Insurance Law, § 58 (Consol. Laws 1909, c. 28), declares that nothing shall be incorporated in a policy referring to the constitution, by-laws, rules, applications, or other writings, unless indorsed upon the policy.

An Ohio statute (Rev. St. § 3623) provides that life insurance companies shall return to the insured a copy of the application for a policy of life insurance.

Under Acts 1907, cc. 441, 457, misrepresentations in application not attached to or incorporated in policy will not avoid policy. *Arnold v. New York Life Ins. Co.*, 177 S. W. 78, 131 Tenn. 720.

Under the statutes of the state, application for live stock policy, to be part of the policy, must be incorporated in it. *Bush v. Indiana & Ohio Live Stock Ins. Co.*, 74 W. Va. 244, 81 S. E. 984.

A proposed life insurance policy form, not containing a provision that the contract includes the application as well as the policy, and, also a provision that no statement made by the insured shall be used in defense of a claim under the policy unless contained in a written application, a copy of which is indorsed on or attached to the policy when issued, as required by St. 1907, p. 896, c. 576, § 75, subsec. 3, was defective. *New York Life Ins. Co. v. Hardison*, 85 N. E. 410, 199 Mass. 190, 127 Am. St. Rep. 478; *Mutual Benefit Life Ins. Co. v. Same*, Id.

679 (b). The validity of the Iowa statute requiring the application to be attached to the policy was sustained in *Rauen v. Prudential Ins. Co.*, 129 Iowa, 725, 106 N. W. 198.

680 (b). In *Rauen v. Prudential Ins. Co.*, 129 Iowa, 725, 106 N. W. 198, it appeared that the answer alleged that the policy was issued and delivered in Minnesota, and that the only statute relating to the duty of attaching to the policy a copy of the application was Gen. Laws Minn. 1895, p. 430, c. 175, § 71, providing that a policy containing a reference to the application must have attached thereto a copy of the application. It was held that the effect of the statute was raised, making it necessary for the court to determine the effect thereof.

The applicability of the statute may depend on the question as to what constitutes an application. It has been held that the Pennsylvania statute applies only to written policies, and does not apply to oral contracts of insurance (*Benner v. Fire Ass'n of Philadelphia*, 229 Pa. 75, 78 Atl. 44, 140 Am. St. Rep. 706). So, too, the

Kentucky statute does not apply, if a policy was never issued, and the application and receipt for first premium form the only evidences of a contract between the parties (*Commonwealth Life Ins. Co. v. Davis*, 136 Ky. 339, 124 S. W. 345). A writing executed by a corporation for the purpose of procuring a fidelity bond insuring it against loss through the fraud or dishonesty of an officer is an application for insurance within the meaning of the Iowa statute (*United States Fidelity & Guaranty Co. v. Egg Shippers' Strawboard & Filler Co.*, 148 Fed. 353, 78 C. C. A. 345). The Massachusetts statute applies only to the application upon which the original policy is issued, and not to the application for a revival of the policy after the same has lapsed (*Holden v. Metropolitan Life Ins. Co.*, 188 Mass. 212, 74 N. E. 337). Code D. C. § 657, providing that each insurance company doing a life insurance business in the District of Columbia shall deliver with each policy a copy of the application made by insured, so that the whole contract may appear in said application and policy, in default of which no defense shall be allowed to such policy on account of anything contained in, or omitted from, such application, as amended by Act June 30, 1902, applies to an application for the renewal of a lapsed policy as well as to one for the original policy; and there is no error in excluding from the evidence a renewal application a copy of which was not so delivered (*Metropolitan Life Ins. Co. v. Burch*, 39 App. D. C. 397). On the other hand, it was held in Ohio (*Prudential Ins. Co. v. Gilligan*, 28 Ohio Cir. Ct. R. 609) that the Ohio statute relating to the application for life policies applies to the application for a renewal.

681 (b). It has been held in New York (*Perry v. Prudential Ins. Co. of America*, 144 App. Div. 780, 129 N. Y. Supp. 751) that the New York statute applies only to policies issued on or after January 1, 1907, and hence did not apply to a policy issued in 1900.

681-683. (c) Same—To what kinds of insurance statutes apply

681 (c). The tendency of the courts is to construe these statutes as applicable for all kinds of insurance contracts that may fairly be regarded as within their scope. For example, the Kentucky statute, under which an application for life insurance must be attached to the policy, applies to the life policy part of a contract giving both life and accident insurance (*Continental Casualty Co. v. Harrod* [Ky.] 100 S. W. 262). Under the Texas statute (*Rev.*

Civ. St. 1911, art. 4951) requiring life insurance policies, except indisputable policies, to be accompanied by a copy of the application, a policy containing a clause providing that it is incontestable after one year, provided the required premiums are paid, and is free from conditions as to residence, travel, and place of death, is within the exception contained in the statute (*Grell v. Sam Houston Life Ins. Co.* [Tex. Civ. App.] 157 S. W. 757). The Tennessee statute (Acts 1907, c. 441) does not apply to industrial policies (*Life & Casualty Ins. Co. v. King*, 137 Tenn. 685, 195 S. W. 585).

682 (c). The Wisconsin statute, providing that applications for fire insurance must be attached to the policy, does not apply to domestic mutual companies, but has been held to apply to mutual corporations organized outside of the state (*Waukau Mill. Co. v. Citizens' Mut. Fire Ins. Co.*, 130 Wis. 47, 109 N. W. 937, 118 Am. St. Rep. 998, 10 Ann. Cas. 795). Though, as indicated in the original text, the Pennsylvania statute was construed in an early case as applying to policies on live stock, it was held in *Snyder v. Globe Mutual Live Stock Ins. Co.*, 38 Pa. Super. Ct. 623, that the statute did not apply to policies of insurance issued by a mutual live stock insurance company.

683 (c). In *Heralds of Liberty v. Bowen*, 8 Ga. App. 325, 68 S. E. 1008, it was held that the Georgia statute applies to the contracts of mutual benefit associations. On the other hand, it has been held in New York, Minnesota, and Massachusetts that the statutes of those states do not apply to mutual benefit associations organized under the lodge system.

Hoff v. Hoff, 161 N. Y. Supp. 520, 175 App. Div. 40, affirming judgment *Same v. Supreme Lodge Knights of Pythias*, 161 N. Y. Supp. 1012, 98 Misc. Rep. 61; *Louden v. Modern Brotherhood of America*, 107 Minn. 12, 119 N. W. 425; *Attorney General v. Colonial Life Ass'n*, 194 Mass. 527, 80 N. E. 455.

Though it has been held that the Kentucky statute of 1903 (section 679) did not apply to fraternal benefit associations (*Grand Lodge A. O. U. W. of Kentucky v. Edwards* [Ky.] 85 S. W. 701), this statute was amended in 1906 (Laws 1906, c. 141), so as to bring fraternal insurance societies operating on the lodge system within its terms (*Yeomen of America v. Rott*, 145 Ky. 604, 140 S. W. 1018). The Pennsylvania statute (Act May 11, 1881 [P. L. 20]), requiring that application and by-laws be attached to certificate, applies to accident insurance companies, but not to beneficial so-

cieties, so that evidence of application and by-laws of beneficial society, though not attached to certificate, was admissible (*Jones v. Commonwealth Casualty Co.*, 255 Pa. 566, 100 Atl. 450).

The Iowa statute (Code 1897, § 1741) requiring insurance companies to attach a copy of the application to each policy of insurance issued by them, applies to all forms of insurance, including fidelity bonds (*United States Fidelity & Guaranty Co. v. Egg Shippers' Strawboard & Filler Co.*, 148 Fed. 353, 78 C. C. A. 345).

683-685. (d) Same—Sufficiency of compliance with statute

683 (d). The question has often been raised as to what will be regarded as part of the application within the statute. The medical examination, or at least so much of it as consists of the declarations made by the insured, is considered as a part of the application (*Hews v. Equitable Life Assur. Soc. of United States*, 143 Fed. 850, 74 C. C. A. 676). So, where a certificate of insurance provided that it was issued on the statements of the insured in his application for membership and also those made by him to the medical examiner, both of which were filed in the secretary's office and made a part of the contract, such application, so far as material, was incorporated in the certificate and constituted a part of the contract of insurance to the same extent as if it had been formally repeated therein (*Attorney General v. Colonial Life Ass'n*, 194 Mass. 527, 80 N. E. 455).

684 (d). On the other hand, under District of Columbia Code of Law 1901, § 657, a mere preliminary statement, made to the company by its agent, and which he alone signs, is not a part of the contract of insurance and need not be delivered with the policy (*Griffith v. Metropolitan Life Ins. Co. of New York*, 36 App. D. C. 8). In *Bonville v. John Hancock Mut. Life Ins. Co.*, 200 Mass. 197, 85 N. E. 1057, the facts were these: A life insurance company furnished its agents a printed blank for use by applicants for insurance, which first had blanks, under the caption "Proposal for Insurance," to be filled and signed by applicants, next had a "memorandum for the solicitor to sign," followed by two questions as to amount of insurance now in force in the company and amount now applied for, and then, under the caption "Application for Insurance," questions as to health and other matters affecting the risk, to be answered over the signature of applicant, together with a declaration and warranty as to the representations and answers.

It was held that neither the proposal for insurance nor the memorandum for the solicitor to fill was a part of the "application," within Rev. Laws, c. 118, § 73, requiring as a condition to the insurer introducing the application in evidence, that a correct copy of it shall have been annexed to the policy.

An important question is whether what purports to be a copy of the application is a correct copy, so as to constitute a compliance with the statute. Generally speaking it is necessary that a copy of the entire application be delivered with the policy, it not being left to the discretion of the insurer to select such parts of the application as it may deem material (*Metropolitan Life Ins. Co. v. Hawkins*, 31 App. D. C. 493, 14 Ann. Cas. 1092). So, where there are discrepancies in matters of substance between the original application for a life policy and the copy of the application returned with the policy, the copy is not full and complete within the meaning of the statute (*Ohio Mut. Life Ins. Co. v. Hoffman*, 32 Ohio Cir. Ct. R. 653, affirmed in 83 Ohio St. 477, 94 N. E. 1112).

Thus, where the copy of the application attached to the policy did not contain a certain question and answer, and no copy of the declarations and answers in which they were found was attached to the policy, the statute was not complied with (*Paquette v. Prudential Ins. Co. of America*, 193 Mass. 215, 79 N. E. 250). So, too, where it appears that the original application was not attached to the policy but what purported to be the application was copied therein, the application itself, and any questions relating to the answers in the application, are properly excluded, where it appears that in the blank for a description of the property in the copy in the policy occurred the statement, "Same as body of policy," and that the only description of the property was upon a slip pasted on the policy (*Greiner v. Safety Mut. Fire Ins. Co.*, 40 Pa. Super. Ct. 387; *Same v. Commercial Mut. Fire Ins. Co.*, Id. 391). On the other hand, minor discrepancies will not be treated as a noncompliance with the statute; thus, where the application did not contain the name of the beneficiary, the copy thereof attached to the policy was held to be a sufficient compliance with the statute (*Langdeau v. John Hancock Mut. Life Ins. Co.*, 194 Mass. 56, 80 N. E. 452, 18 L. R. A. [N. S.] 1190). Similarly, where the pretended copy of an application for insurance attached to the certificate departed from the original application only by omitting the words "question" and "answer" preceding the questions and answers, but

it was apparent that the items therein were in fact questions to and answers by the applicant, the discrepancy did not show an omission of defendant to attach to its certificate or indorse thereon a true copy of the application (*Knapp v. Brotherhood of American Yeomen*, 139 Iowa, 136, 117 N. W. 298). The Massachusetts statute (Rev. Laws, c. 118, § 73), provides that every life policy which contains a reference to the application, must have attached thereto, a correct copy of the application, and that unless so attached the same shall not be considered a part of the policy, and that each application for such policy shall have printed upon it in bold-faced type, "Under the laws of Massachusetts, each applicant for a policy to be issued hereunder is entitled to be furnished with a copy of this application attached to any policy issued thereon." It was held in *Moore v. Northwestern Mut. Life Ins. Co.*, 192 Mass. 468, 78 N. E. 488, 7 Ann. Cas. 656, that it was the intent to inform an insured that he was entitled to a copy of the application, and when that is done the application forms a part of the contract, although the words required to be printed are omitted.

For an application for accident and health insurance in a foreign insurance company to be a part of the contract, it must, under Code W. Va. 1906, c. 34, as amended by Acts 1907, c. 77, §§ 15, 62, 69, be attached to the policy; mere reference to it in the policy and adoption in terms not being sufficient (*Bowyer v. Continental Casualty Co.*, 72 W. Va. 333, 78 S. E. 1000).

685-687. (e) Same—Effect of noncompliance with statute—Admissibility of application in evidence

686 (e). If the insurance company fails to attach to the policy a correct copy of the application as required by statute, it is estopped to plead in defense to an action on the policy the falsity of any of the statements in such applications.

Metropolitan Life Ins. Co. v. Hawkins, 31 App. D. C. 493, 14 Ann. Cas. 1092; *Torbert v. Cherokee Ins. Co.*, 82 S. E. 134, 141 Ga. 773; *Deming v. Prudential Ins. Co.*, 169 Ill. App. 96; *Rauen v. Prudential Ins. Co.*, 106 N. W. 198, 129 Iowa, 725 (construing the Minnesota statute); *Biermann v. Guaranty Mut. Life Ins. Co.*, 142 Iowa, 341, 120 N. W. 963; *Mullen v. Woodmen of the World*, 144 Iowa, 228, 122 N. W. 908; *Nutter v. Des Moines Life Ins. Co.*, 156 Iowa, 539, 136 N. W. 891; *Sovereign Camp of Woodmen of the World v. Salmon (Ky.)* 120 S. W. 358; *Metropolitan Life Ins. Co. v. Little*, 149 S. W. 998, 149 Ky. 717; *New York Life Ins. Co. v. Hardison*, 199 Mass. 190, 85 N. E. 410, 127 Am. St. Rep. 478;

New York Life Ins. Co. v. Hamburger, 174 Mich. 254, 140 N. W. 510; Becker v. Colonial Life Ins. Co., 138 N. Y. Supp. 491, 153 App. Div. 382, affirming order 133 N. Y. Supp. 481, 75 Misc. Rep. 213; Murphy v. Colonial Life Ins. Co. of America, 145 N. Y. Supp. 196, 83 Misc. Rep. 475, judgment modified 163 App. Div. 875, 147 N. Y. Supp. 565; Mees v. Pittsburgh Life & Trust Co., 154 N. Y. Supp. 660, 160 App. Div. 86; Fidelity Title & Trust Co. v. Illinois Life Ins. Co., 63 Atl. 51, 213 Pa. 415; Paulhamus v. Security Life & Annuity Co. (C. C.) 163 Fed. 554.

The failure of the insurer to comply with the statute renders the application inadmissible in evidence on behalf of the insurer to show any misrepresentation on the part of the insured.

Tusant v. Grand Lodge, A. O. U. W. (Iowa) 163 N. W. 690; Griffin's Adm'r v. Equitable Assur. Soc., 84 S. W. 1164, 119 Ky. 858, 27 Ky. Law Rep. 313; Southern States Mut. Life Ins. Co. v. Herlihy, 138 Ky. 359, 128 S. W. 91; Independent Life Ins. Co. of America v. Rider, 150 S. W. 649, 150 Ky. 505, 42 L. R. A. (N. S.) 560; Wheelock v. Home Life Ins. Co., 115 Minn. 177, 131 N. W. 1081; Schuler v. Metropolitan Life Ins. Co., 191 Mo. App. 52, 176 S. W. 274; Murphy v. Colonial Life Ins. Co. of America, 63 App. Div. 875, 147 N. Y. Supp. 565, modifying judgment 145 N. Y. Supp. 196, 83 Misc. Rep. 475; Custer v. Fidelity Mut. Aid Ass'n, 60 Atl. 776, 211 Pa. 257; Fidelity Title & Trust Co. v. Illinois Life Ins. Co., 63 Atl. 51, 213 Pa. 415; Goldberg v. Crown Mut. Fire Ins. Co., 61 Pa. Super. Ct. 360; National Live Stock Ins. Co. v. Gomillion (Tex. Civ. App.) 178 S. W. 1050, rehearing denied (Tex. Civ. App.) 179 S. W. 671.

It has, however, been held in Massachusetts that the application is inadmissible only in actions between the insurer and persons claiming under the policy, so that in a suit by the parents of the insured against his widow, an administratrix, to recover possession of the policy, the application was admissible, if otherwise competent, though not attached to the policy (Knowles v. Knowles, 205 Mass. 290, 91 N. E. 213). So, too, it has been held that the policy is admissible on behalf of the insured (Kirkpatrick v. London Guarantee & Accident Co., 139 Iowa, 370, 115 N. W. 1107, 19 L. R. A. [N. S.] 102). But it would seem that the contrary rule prevailed in Kentucky (Western & Southern Life Ins. Co. v. Davis, 141 Ky. 358, 132 S. W. 410).

Where the certificate issued by a "fraternal beneficiary association," as defined by Civ. Code Ga. 1910, § 2866, referred to the application, constitution and by-laws as a part of the contract, they were admissible, though not attached to the certificate, as required

by Civ. Code 1910, § 2471, in the case of ordinary insurance policies; Civ. Code 1910, § 2869, exempting fraternal associations from the provisions of the insurance laws (*Fraternal Life & Accident Ass'n v. Evans*, 78 S. E. 915, 140 Ga. 284).

687 (e). A failure to attach the application does not affect the admissibility of the policy itself (*Ellis v. Metropolitan Life Ins. Co.*, 228 Pa. 230, 77 Atl. 460). Nor will it prevent the insurer from showing a breach of conditions or warranties contained in the policy itself (*Kirkpatrick v. London Guarantee & Accident Co.*, 139 Iowa, 370, 115 N. W. 1107, 19 L. R. A. [N. S.] 102).

Even where the written application or a copy thereof is not attached to the policy, it does not prevent the insurer from showing actual fraud in the inception of the contract.

Empire Life Ins. Co. v. Gee, 171 Ala. 435, 55 South. 166; *Johnson v. American Nat. Life Ins. Co.*, 134 Ga. 800, 68 S. E. 731; *Southern Life Ins. Co. v. Hill*, 8 Ga. App. 857, 70 S. E. 186; *Hews v. Equitable Life Assur. Soc. of United States*, 143 Fed. 850, 74 C. C. A. 676; *Southern Life Ins. Co. v. Logan*, 9 Ga. App. 503, 71 S. E. 742.

It has been held in Massachusetts that the statute does not prevent proof of fraud by the introduction of an application in writing in those cases where no application is referred to in the policy (*Holden v. Prudential Ins. Co. of America*, 191 Mass. 153, 77 N. E. 309).

687-689. (f) Construction of application and policy

687 (f). In construing the statements in an application for life insurance, the interrogatories and answers thereto must be construed together (*Collins v. Catholic Order of Foresters*, 43 Ind. App. 549, 88 N. E. 87). The same rule of liberal construction as is applied in the construction of policies should be applied in the construction of the application; that is to say, it should be liberally construed in favor of the insured.

Globe Mut. Life Ins. Ass'n v. Meyer, 118 Ill. App. 155; *Smith v. Bankers' Life Ass'n*, 123 Ill. App. 392; *Krell v. Chickasaw Farmers' Mut. Fire Ins. Co.*, 104 N. W. 364, 127 Iowa, 748; *Hewey v. Metropolitan Life Ins. Co.*, 62 Atl. 600, 100 Me. 523; *Perry v. John Hancock Mut. Life Ins. Co.*, 106 N. W. 860, 143 Mich. 290; *Claver v. Woodmen of the World*, 133 S. W. 153, 152 Mo. App. 155; *Modern Woodmen of America v. Wilson*, 107 N. W. 568, 76 Neb. 344; *Diamond v. Metropolitan Life Ins. Co.* (Sup.) 116 N. Y. Supp. 617.

688 (f). As the application is regarded as part of the contract, the policy must be construed in connection therewith in order to arrive at a correct determination of the terms of the contract.

Satterfield v. Fidelity Mut. Life Ins. Co., 171 Ala. 429, 55 South. 200; *Mutual Life Ins. Co. v. Durden*, 9 Ga. App. 797, 72 S. E. 295; *Kelly v. Metropolitan Life Ins. Co.*, 152 Ill. App. 179; *Harvick v. Modern Woodmen of America*, 158 Ill. App. 570; *Pride v. Switchmen's Union of North America*, 178 Ill. App. 434; *Stitt v. Locomotive Engineers' Mut. Protective Ass'n*, 177 Mich. 207, 142 N. W. 1110; *Schas v. Equitable Life Ins. Co.*, 81 S. E. 1014, 166 N. C. 55; *North American Acc. Ins. Co. v. Bowen* (Tex. Civ. App.) 102 S. W. 163; *Logan v. Provident Sav. Life Assur. Soc. of New York*, 57 W. Va. 384, 50 S. E. 529.

Where an application for credit insurance did not in terms refer to the policy, the policy could not be looked to in construing the application (*L. Black Co. v. London Guarantee & Accident Co.*, 144 N. Y. Supp. 424, 159 App. Div. 186).

In case of a conflict between the provisions of the policy and the statements contained in the application for insurance, the provisions of the policy will control.

Gregoric v. Prudential Ins. Co., 165 Ill. App. 570; *Tate v. Jasper County Farmers' Mut. Ins. Co.*, 113 S. W. 659, 133 Mo. App. 584; *Harr v. Highland Nobles*, 78 Neb. 175, 110 N. W. 713; *Logan v. Provident Sav. Life Assur. Soc. of New York*, 50 S. E. 529, 57 W. Va. 384.

Where a live stock policy made the application a part of it, the application would control if the policy provided that the horse should be insured only while it remained in a certain county and the application did not so limit the liability (*Indiana & O. Live Stock Ins. Co. v. Keiningham* [Tex. Civ. App.] 161 S. W. 384).

689-690. (g) Questions of practice

689 (g). It is not generally necessary for the plaintiff to set out the terms of the application in his complaint.

Supreme Lodge K. P. v. Graham, 49 Ind. App. 535, 97 N. E. 806; *Commercial Life Ins. Co. v. McGinnis*, 50 Ind. App. 630, 97 N. E. 1018. And see, also, *Western & Southern Life Ins. Co. v. Davis*, 141 Ky. 358, 132 S. W. 410, holding that, in view of the Kentucky Statute requiring the application to be attached to the policy, it was proper to strike from plaintiff's petition a copy of the application when such application had not been attached to the policy.

In an action on an accident policy, a part of the application for the policy, produced by the insurer, without explaining its fragmentary condition, is inadmissible (*Ward's Adm'r v. Preferred Acc. Ins. Co.*, 67 Atl. 821, 80 Vt. 321). If a policy sued upon recites that the same contained "the entire contract between the parties," the application upon which it is predicated is not necessarily competent in its entirety, but only such portions of the application are admissible as distinctly pertained to the special pleas (*Deming v. Prudential Ins. Co. of America*, 169 Ill. App. 96). Evidence of the custom of a company in attaching a copy of the application and by-laws to policies when issued is inadmissible to show that the application and by-laws had been attached to a particular policy (*Custer v. Fidelity Mut. Aid Ass'n*, 60 Atl. 776, 211 Pa. 257). Where, after a policy had been delivered, the insured returned it to the insurer, claiming that the application had been altered, and that the policy did not conform to the original application, the declarations of insured were relevant, in an action subsequently brought on the policy, after insured's death, to show that the application had been changed without insured's knowledge, and as to whether the delivery of the policy was unconditional or qualified (*Waters v. Security Life & Annuity Co.*, 57 S. E. 437, 144 N. C. 663, 13 L. R. A. [N. S.] 805).

5. CHARTER, CONSTITUTION, BY-LAWS, AND STATUTES AS PART OF THE CONTRACT

690-691. (a) Statutes and ordinances as part of the contract

691 (a). Statutes of the state, relating to insurance, in force at the time a policy is issued, must be regarded as entering into and forming a part of it to the same effect as if embodied therein.

Finnell v. Franklin, 55 Colo. 156, 134 Pac. 122; *Nowak v. Murray*, 127 Ill. App. 125; *Kaemmerer v. Kaemmerer*, 231 Ill. 154, 83 N. E. 133; *Bolles v. Mutual Reserve Fund Life Ass'n*, 220 Ill. 400, 77 N. E. 198, reversing 120 Ill. App. 242; *Mischler v. Mutual Reserve Fund Life Ass'n*, 220 Ill. 451, 77 N. E. 202, reversing 120 Ill. App. 251; *Hall v. Ayer's Guardian (Ky.)* 105 S. W. 911; *Kentucky Growers' Ins. Co. v. Logan*, 149 Ky. 453, 149 S. W. 922; *Christensen v. New York Life Ins. Co.*, 160 Mo. App. 486, 141 S. W. 6; *Sharp v. Niagara Fire Ins. Co.*, 164 Mo. App. 475, 147 S. W. 154; *McKinney v. Fidelity Mut. Ins. Co.*, 270 Mo. 305, 193 S. W. 564; *Archer v. Equitable Life Assur. Soc. of United States*,

112 N. E. 433, 218 N. Y. 18, affirming order 154 N. Y. Supp. 519, 169 App. Div. 43; *Warren v. Postal Life Ins. Co.*, 148 N. Y. Supp. 1024, 163 App. Div. 638; *Edelson v. Metropolitan Life Ins. Co.*, 158 N. Y. Supp. 1018, 95 Misc. Rep. 218; *J. P. Lamb & Co. v. Merchants' Nat. Mut. Fire Ins. Co.*, 18 N. D. 258, 119 N. W. 1048; *Union Mut. Ins. Co. v. Huntsberry (Okl.)* 156 Pac. 327; *Camden Wholesale Grocery v. National Fire Ins. Co. of Hartford, Conn.*, 106 S. C. 467, 91 S. E. 732; *Breakstone v. Appleton Mut. Fire Ins. Co.*, 149 Wis. 303, 135 N. W. 853; *Malancy v. Malancy*, 165 Wis. 642, 163 N. W. 186.

So a mutual fire insurance policy is governed by statutes existing when it issued, though earlier statutes were embodied in the company's articles of organization and indorsed on the policy (*Breakstone v. Appleton Mut. Fire Ins. Co.*, 135 N. W. 853, 149 Wis. 303). And, too, a statute authorizing reinsurance is part of the contract of reinsurance, and stipulations in conflict therewith are void (*Federal Life Ins. Co. v. Kerr [Ind. App.]* 82 N. E. 943). Persons entering into dentist's indemnity insurance policy will be presumed to have contracted with full knowledge of the legal effect of their acts under the laws relating to the practice of dentistry (*Betts v. Massachusetts Bonding & Ins. Co. [N. J.]* 101 Atl. 257). Moreover, when the exercise of corporate powers by an insurance association has been regulated by statute, the corporation cannot by its by-laws or resolutions change the mode of exercise of this power (*Lange v. Royal Highlanders*, 75 Neb. 188, 106 N. W. 224, 110 N. W. 1110, 10 L. R. A. [N. S.] 666, 121 Am. Rep. 786). And where a statute makes provision for the benefit of insured in a life policy, the parties to the insurance contract may not contract away the statutory right and thereby nullify the statute (*Chandler v. John Hancock Mut. Life Ins. Co.*, 167 S. W. 1162, 180 Mo. App. 394).

When writing insurance on buildings within city fire limits, the insurer is bound by the laws and ordinances of the city (*Dinneen v. American Ins. Co.*, 98 Neb. 97, 152 N. W. 307, L. R. A. 1915E, 618, Ann. Cas. 1917B, 1246).

A contract of insurance between a corporation organized in a sister state and insured makes the law of the sister state a part of the contract (*Supreme Council Catholic Knights of America v. Logsdon*, 183 Ind. 183, 108 N. E. 587). Where a fraternal insurance contract was conditioned upon the laws of the state of the domicile of the society, and the constitution and by-laws of the so-

ciety did not specify the classes of beneficiaries, except by reciting the statute, such statute is a part of each contract, even though the contract is consummated in a foreign state (*Supreme Colony United Order of Pilgrim Fathers v. Towne*, 89 A. 264, 87 Conn. 644, Ann. Cas. 1916B, 181).

Such statutes can apply, however, only to policies issued after its passage. They cannot be construed as retroactive in their operation.

Northwestern Traveling Men's Ass'n v. Crawford, 126 Ill. App. 468, decree affirmed *Crawford v. Northwestern Traveling Men's Ass'n*, 80 N. E. 736, 226 Ill. 57, 10 L. R. A. (N. S.) 264; *Sage v. Finney*, 156 Mo. App. 30, 135 S. W. 996; *Christensen v. New York Life Ins. Co.*, 160 Mo. App. 486, 141 S. W. 6; *Palmer v. Loyal Mystic Legion of America*, 126 N. W. 285, 86 Neb. 596.

So, too, statutes relating to the by-laws of mutual benefit associations have no application to and do not affect by-laws previously enacted (*Leland v. Modern Samaritans*, 111 Minn. 207, 126 N. W. 728).

The Legislature may amend the statute under which a mutual benefit insurance association was organized so as to limit the scope of business authorized under its charter in so far as the amendment does not impair the obligation of existing contracts (*Sturges v. Sturges*, 126 Ky. 80, 102 S. W. 884, 31 Ky. Law Rep. 537, 12 L. R. A. [N. S.] 1014). And to the same effect is *American Guild v. Wyatt*, 125 Ky. 44, 100 S. W. 266.

In *Brown v. Equitable Life Assur. Soc. (C. C.)* 142 Fed. 835, it was held that Laws N. Y. 1892, p. 1958, c. 690, § 56, which expressly prohibits the appointment of a receiver for, or the direction of an accounting by, an insurance company, unless the Attorney General makes the application or approves the same, is a part of the contract of every policy holder of a New York insurance company, although he may be a citizen of a foreign state; and he is bound thereby. The statute was, however, repealed subsequent to the decision, and the judgment in the case was reversed by the Circuit Court of Appeals in 151 Fed. 1, 81 C. C. A. 1, 10 Ann. Cas. 402.

692. (b) Subjection of members of mutual company to charter, by-laws, and rules

692 (b). The members of a mutual company, who become such either by taking out a policy or by taking an assignment of a poli-

cy, are presumed to have knowledge of and are bound by the provisions of the charter, by-laws, and rules of the company.

Northwestern Nat. Life Ins. Co. v. Gray, 161 Fed. 488, 88 C. C. A. 430; *Brashears v. Perry County Farmers' Protective Ins. Co.*, 51 Ind. App. 8, 98 N. E. 889; *Frick v. Hartford Life Ins. Co. (Iowa)* 159 N. W. 247; *Kentucky Growers' Ins. Co. v. Logan*, 149 S. W. 922, 149 Ky. 453; *Swett v. Antelope County Farmers' Mut. Ins. Co.*, 91 Neb. 561, 136 N. W. 347; *J. P. Lamb & Co. v. Merchants' Nat. Mut. Fire Ins. Co.*, 18 N. D. 253, 119 N. W. 1048; *Stutzman v. Cicero Mut. Fire Ins. Co.*, 150 Wis. 254, 136 N. W. 604.

But in *Younghoe v. Grain Shippers' Mut. Fire Ins. Ass'n*, 126 Iowa, 374, 102 N. W. 137, it was said that the delivery of a fire policy in a mutual association and the payment by insured of his contingent fee being contemporaneous acts, insured was not charged at the time he paid the fee with notice of provisions of the association's charter and by-laws, on the theory that, it being a mutual association, he was chargeable with notice as a member. And it is held in South Carolina that under the statute (Civ. Code 1912, § 2777) a by-law of a mutual insurance association not printed in the policy nor mailed to insured is not binding on him (*Roach v. Farmers' Mut. Ins. Ass'n of Oconee County*, 102 S. C. 478, 86 S. E. 950).

By-laws of a mutual insurance association, in conflict with express statutory provisions, cannot be sustained. *Schultz v. Des Moines Mut. Hail & Cyclone Ins. Ass'n*, 153 N. W. 884, 35 S. D. 627, Ann. Cas. 1917D, 78.

692-695. (c) Charter, by-laws, and rules as part of the contract

693 (c). The charter, by-laws, and rules of a mutual company, if properly incorporated therein, must be regarded as part of the contract.

Reference may be made to *Brashears v. Perry County Farmers' Protective Ins. Co.*, 51 Ind. App. 8, 98 N. E. 889; *Rhodes v. Illinois Commercial Men's Ass'n*, 185 Ill. App. 439; *Moran v. Franklin Life Ins. Co.*, 160 Mo. App. 407, 140 S. W. 955; *Dempster v. Opocensky*, 81 Neb. 612, 116 N. W. 524; *J. P. Lamb & Co. v. Merchants' Nat. Mut. Fire Ins. Co.*, 18 N. D. 253, 119 N. W. 1048; *Rowe v. United States Industrial Life Ins. Co.*, 72 S. E. 1018, 90 S. C. 168.

The provisions of a mutual fire insurance company's charter under which it seeks to evade liability for loss will be strictly con-

strued against the insurer (*Leonard v. Farmers' Mut. Fire Ins. Co. of Monroe and Wayne Counties*, 192 Mich. 230, 158 N. W. 1041).

If, however, the charter, by-laws, and rules are not incorporated in the contract, by reference or otherwise, they cannot be considered part of the contract.

Puryear v. Farmers' Mut. Ins. Ass'n, 73 S. E. 851, 137 Ga. 579; *Gleason v. Canterbury Mut. Fire Ins. Co.*, 64 Atl. 187, 73 N. H. 583; *Bruger v. Princeton & St. M. Mut. Fire Ins. Co.*, 109 N. W. 95, 129 Wis. 281.

Though the by-laws of a mutual fire insurance company were not copied into the policy, nor written on its margin, nor across its face, nor upon a separate slip or rider attached thereto, yet where they were expressly referred to in the deposit note as an essential part of it, and the note was not only mentioned in the policy, but was a part of the contract of insurance by virtue of the express provisions of Rev. St. c. 49, § 30, they formed a part of the contract of insurance, especially in so far as they related to assessment, and the effect of nonpayment thereof (*Russell v. Oxford County Patrons of Husbandry Mut. Fire Ins. Co.*, 107 Me. 362, 78 Atl. 459). Where accident company agreed to furnish a copy of its by-laws to the insured, but failed to do so, and the insured had no knowledge of a condition in the by-laws making a claim for partial disability final and precluding recovery of a greater amount, he was not bound thereby (*International Travelers' Ass'n v. Powell* [Tex. Civ. App.] 196 S. W. 957).

In some states the incorporation of the charter, by-laws, or rules of a mutual company is governed by statute. Thus it has been held in Pennsylvania that, where an insurance policy declares that the charter of the company is part of the contract, it must, under Act May 11, 1881 (P. L. 20), be attached to the policy; and, if not, any defense based on the charter must fail (*Muhlenberg v. Mutual Fire Ins. Co.*, 60 Atl. 995, 211 Pa. 432).

694 (c). The Kentucky statute (Ky. St. 1903, § 679), providing that all life policies containing any reference to the by-laws of the corporation shall have attached thereto a correct copy of the by-laws referred to, applies to persons insured in the state by companies doing business in the state, though such companies were organized in other states, irrespective of where the contract was entered into (*Supreme Lodge Knights of Pythias v. Hunziker*, 121 Ky. 33, 87 S. W. 1134). But it was also held in the same case that

the statute may be complied with, subsequent to the contract, by tendering a copy within a reasonable time and offering to attach it to the policy. The Kansas statute declares that every policy issued by a mutual company shall have attached thereto a printed copy of the by-laws. It was held in *Smith v. Republic County Mut. Fire Ins. Co.*, 82 Kan. 697, 109 Pac. 390, that where a policy holder in a mutual company signed an application agreeing to accept his policy subject to the by-laws of the company, a copy of which application was attached to the policy when issued, the assignee of the policy cannot be heard to say that the by-laws are not a part of the contract, though the copy of the by-laws attached to the policy was not signed as required by the statute.

Insurance Law (Consol. Laws 1909, c. 28) § 58, providing that nothing shall be incorporated in a policy referring to the constitution, by-laws, rules, applications, or other writings, unless indorsed upon the policy when issued, applies only to policies issued on or after January 1, 1907, hence has no application to a policy issued in 1900 (*Perry v. Prudential Ins. Co. of America*, 129 N. Y. Supp. 751, 144 App. Div. 780).

Since they are to be regarded as part of the contract, the charter and by-laws are to be referred to in construing the policy.

Brashears v. Perry County Farmers' Protective Ins. Co., 51 Ind. App. 8, 98 N. E. 889; *Hayden v. Franklin Life Ins. Co.*, 136 Fed. 285, 69 C. C. A. 423.

695-697. (d) Subjection of member of mutual company to subsequent by-laws

695 (d). Generally, in the absence of any express stipulations giving the right, or the subsequent assent of the member, the member of a mutual company is not bound by the passage of a new by-law, especially when it impairs his contract (*Rockwell v. Knights Templars & Masonic Mut. Aid Ass'n*, 134 App. Div. 736, 119 N. Y. Supp. 515).

696 (d). In *Robinson v. Mutual Reserve Life Ins. Co.*, 159 Fed. 564, the facts were as follows: The by-laws of a mutual insurance company contained no provision for notice of a special meeting at which amendments of the by-laws might be adopted, but declared that notice of annual meetings should be given by publication for three consecutive days, at least five days prior thereto, in two daily newspapers published in New York. *Insurance Law N. Y., Laws 1892, p. 2013, c. 690, § 209*, requires every mutual insurance com-

pany to cause amendments proposed to any by-laws to be mailed to its members, so as to give them not less than five days' notice of the time and place where they are to be considered. It was held that such article amounts to a requirement that reasonable notice should be given, and that five days' notice was not sufficient, where the amendments proposed were complicated and the members were scattered over the United States and foreign countries.

On the other hand, if the member of a mutual company agrees in his application to be governed by the by-laws then in force or thereafter to be adopted, he is as much bound by subsequently enacted by-laws as by those in force when his policy was issued.

Northwestern Nat. Life Ins. Co. v. Gray, 161 Fed. 488, 88 C. C. A. 430; *Stark v. Northwestern Nat. Life Ins. Co.* (C. C.) 167 Fed. 191.

So, where the by-laws of a mutual assessment association insuring crops against hail were made by the certificate issued to an insured, a part of the contract, and provided that members should be subject to the provisions of all duly enacted and amended laws, an insured was bound by an amendment of a by-law subsequent to his contract, providing that a delinquency in payment of assessment should relieve the association of liability while such delinquency existed (*Elliott v. Home Mut. Hail Ass'n of Cherokee*, 160 Iowa, 105, 140 N. W. 431).

But it is generally conceded that, even under such an agreement, he is not bound by a subsequent by-law, the effect of which is to impair his vested rights (*Jordan v. Iowa Mutual Tornado Ins. Co.*, 151 Iowa, 73, 130 N. W. 177, Ann. Cas. 1913A, 266). And to the same effect is *Roach v. Farmers' Mut. Ins. Ass'n of Oconee County*, 102 S. C. 478, 86 S. E. 950.

It is presumed that the right of an insurance company of another state to make by-laws is governed by the laws of that state, with which, as provided by Civ. Code Cal. § 301, they must not be inconsistent. *Garrett v. Garrett*, 159 Pac. 1050, 31 Cal. App. 173.

697-698. (e) Members of mutual benefit associations bound by constitution and by-laws

697 (e). Members of mutual benefit associations are charged with notice of and will be bound by the provisions of the constitution and by-laws of the association existing at the time he became a member.

The general principle is supported by the following cases: *United Order of the Golden Cross v. Hooser*, 160 Ala. 334, 49 South. 354;

Woodmen of the World v. Hall, 104 Ark. 538, 148 S. W. 526, 41 L. R. A. (N. S.) 517; Supreme Royal Circle of Friends of the World v. Morrison, 105 Ark. 140, 150 S. W. 561; Schack v. Supreme Lodge of Fraternal Brotherhood, 9 Cal. App. 584, 99 Pac. 989; Ryan v. Knights of Columbus, 82 Conn. 91, 72 Atl. 574; Southern Mut. Aid Ass'n v. Cobb, 60 Fla. 198, 53 South. 505; Benes v. Supreme Lodge, Knights and Ladies of Honor, 231 Ill. 134, 83 N. E. 127, 14 L. R. A. (N. S.) 540, 121 Am. St. Rep. 304; Fraternal Aid Ass'n v. Hitchcock, 121 Ill. App. 402; Quinn v. North American Union, 162 Ill. App. 319; O'Brien v. Rittman, 176 Ill. App. 237; Norton v. Catholic Order of Foresters, 138 Iowa, 464, 114 N. W. 893, 24 L. R. A. (N. S.) 1030; Boeck v. Modern Woodmen of America, 162 Iowa, 159, 143 N. W. 999; Loyd v. Modern Woodmen of America, 113 Mo. App. 19, 87 S. W. 530; Smoot v. Bankers' Life Ass'n, 120 S. W. 719, 138 Mo. App. 438; Shartle v. Modern Brotherhood of America, 122 S. W. 1139, 139 Mo. App. 433; Odd Fellows' Benefit Ass'n v. Smith, 101 Miss. 332, 58 South. 100; Stanton v. Eccentric Ass'n of Firemen, Local Union No. 56, of International Brotherhood of Stationary Firemen, 130 App. Div. 129, 114 N. Y. Supp. 480; Modern Woodmen of America v. Owens (Tex. Civ. App.) 130 S. W. 858; McWilliams v. Modern Woodmen of America (Tex. Civ. App.) 142 S. W. 641; Sterling v. Head Camp, Pacific Jurisdiction, 28 Utah, 505, 80 Pac. 375, rehearing denied 28 Utah, 526, 80 Pac. 1110; Knights of Columbus v. Burroughs' Beneficiary, 107 Va. 671, 60 S. E. 40, 17 L. R. A. (N. S.) 246; Bixler v. Modern Woodmen of America, 112 Va. 678, 72 S. E. 704, 38 L. R. A. (N. S.) 571; Thomas v. Covert, 126 Wis. 593, 105 N. W. 922, 3 L. R. A. (N. S.) 904, 5 Ann. Cas. 456.

Moreover, he is bound by such by-laws, though at the time of entering into the contract the agent had made representations to him which were contrary to the provisions of such by-laws (*Winterberg v. Brotherhood of Locomotive Firemen and Enginemen*, 148 Ky. 501, 146 S. W. 1105). And if plaintiff was a charter member of a beneficial association, and the manuscript copy of its constitution and by-laws was on file in its office before the certificate was delivered to him he was bound by such constitution and by-laws, though he never actually saw them until after he was injured (*The Chevaliers v. Shearer*, 27 Ohio Cir. Ct. R. 509). In *Benes v. Supreme Lodge, Knights and Ladies of Honor*, 231 Ill. 134, 83 N. E. 127, 14 L. R. A. (N. S.) 540, 121 Am. St. Rep. 304, the facts were as follows: A benefit certificate of a mutual benefit society provided that if the member should comply with all laws of the society then in force, or that should afterwards be enacted, the society would pay a specified sum upon his death. A law of the so-

ciety provided that if any member, within five years after becoming a member, should die by his own hand, his certificate should become void. Before joining the society the member inquired for information concerning its laws, and the subordinate lodge officers had given him a pamphlet containing what they represented to be its constitution and by-laws, which did not contain the law regarding suicide, and he had no knowledge of its existence. He died by his own hand within five years after becoming a member of the society. It was held that there could be no recovery on the certificate, since when a person becomes a member of such a society he assumes the duty of knowing its internal laws, and agrees to be governed by them whether he knows them or not.

The rule of a fraternal benefit society, that medical examiners shall reject a pregnant female applicant for membership, unless she signs a waiver of claims resulting from such condition, need not be in writing nor promulgated to be within its rules, subject to all of which the application is, in terms, made. *Clark v. North American Union*, 179 Mich. 131, 146 N. W. 336.

698 (e). There is no presumption that the by-law, apparently enacted after the certificate was issued, was in fact in existence before, so as to bind the insured (*Masonic Ben. Ass'n v. Hoskins*, 99 Miss. 812, 56 South. 169).

The beneficiary in a mutual benefit certificate is bound by the provisions of the constitution and by-laws providing for the manner of presenting claims for death benefits, as he is presumed to know all of such provisions (*Supreme Court, I. O. F., v. Herlinger*, 27 Ohio Cir. Ct. R. 151).

In an action on a benefit certificate, where plaintiff is the beneficiary, it is immaterial that a by-law of such society is void under the laws of Kentucky, although it appears that such society was originally incorporated in such state; it appearing that subsequently such society was incorporated in Indiana, which Indiana corporation thereupon took over the obligations of the former Kentucky corporation (*Apitz v. Supreme Lodge Knights and Ladies of Honor*, 196 Ill. App. 278, judgment affirmed 113 N. E. 63, 274 Ill. 196, L. R. A. 1917A, 183).

698-701. (f) Constitution and by-laws of mutual benefit association as part of the contract

698 (f). The constitution and by-laws of a mutual benefit association, being binding on the member, are properly considered as

forming a part of the contract between the member and the association.

Polk v. Mutual Reserve Fund Life Ass'n (C. C.) 137 Fed. 273; Barrows v. Mutual Reserve Life Ins. Co., 151 Fed. 461, 81 C. C. A. 71; Slaughter v. Grand Lodge, 192 Ala. 301, 68 South. 367; Haynes v. Masonic Ben. Ass'n, 98 Ark. 421, 136 S. W. 187, Ann. Cas. 1912D, 697; Woodmen of the World v. Hall, 104 Ark. 538, 148 S. W. 526, 41 L. R. A. (N. S.) 517; Brotherhood of Locomotive Firemen and Enginemen v. Cravens, 113 Ark. 400, 168 S. W. 1073; O'Connor v. Grand Lodge, A. O. U. W., 140 Cal. 484, 80 Pac. 688; Supreme Lodge of Fraternal Brotherhood v. Price, 27 Cal. App. 607, 150 Pac. 803; Finnell v. Franklin, 55 Colo. 156, 134 Pac. 122; Ryan v. Knights of Columbus, 82 Conn. 91, 72 Atl. 574; Social Benev. Soc. No. 1 v. Holmes, 127 Ga. 586, 56 S. E. 775; Smith v. Locomotive Engineers' Mut. Life & Accident Ins. Ass'n, 138 Ga. 717, 76 S. E. 44; Kaemmerer v. Kaemmerer, 83 N. E. 183, 231 Ill. 154; Enright v. National Council, Knights and Ladies of Security, 97 N. E. 681, 253 Ill. 460, reversing judgment 161 Ill. App. 365; Mutual Protective League v. McKee, 122 Ill. App. 376, judgment affirmed 79 N. E. 25, 223 Ill. 364; Supreme Lodge, Knights and Ladies of Honor, v. Benes, 135 Ill. App. 314, judgment affirmed Benes v. Supreme Lodge, Knights and Ladies of Honor, 83 N. E. 127, 231 Ill. 134, 14 L. R. A. (N. S.) 540, 121 Am. St. Rep. 304; Nowak v. Murray, 127 Ill. App. 125; Quinn v. North American Union, 162 Ill. App. 319; Royal League v. Kolin, 169 Ill. App. 646; Love v. Modern Woodmen of America, 102 N. E. 183, 259 Ill. 102, reversing judgment 177 Ill. App. 76; Dromgold v. Royal Neighbors of America, 103 N. E. 584, 261 Ill. 60, reversing judgment 177 Ill. App. 1; Gauger v. American Patriots, 184 Ill. App. 490, judgment affirmed 105 N. E. 755, 263 Ill. 604; Farra v. Braman (Ind. App.) 82 N. E. 926, rehearing denied (Ind. App.) 84 N. E. 155; Farra v. Braman, 86 N. E. 843, 171 Ind. 529; Supreme Lodge, K. P., v. Graham, 49 Ind. App. 535, 97 N. E. 806; Almy v. Commercial Travelers' Ass'n of Indiana, 59 Ind. App. 249, 106 N. E. 893; Sovereign Camp of Woodmen of the World v. Latham, 59 Ind. App. 290, 107 N. E. 749; Triple Tie Benefit Ass'n v. Wood, 73 Kan. 124, 84 Pac. 565; Hall v. Ayer's Guardian (Ky.) 105 S. W. 911; Howton v. Sovereign Camp Woodmen of the World, 162 Ky. 432, 172 S. W. 687; Grand Lodge A. O. U. W. of Maine v. Edwards, 89 Atl. 147, 111 Me. 359; Grand Lodge A. O. U. W. of Maine v. Conner (Me.) 100 Atl. 1022; Kern v. Arbeiter Unterstuetzungs Verein, 102 N. W. 746, 139 Mich. 233; Knights of the Maccabees of the World v. Brown, 186 Mich. 284, 152 N. W. 1085; Loyd v. Modern Woodmen of America, 87 S. W. 530, 113 Mo. App. 19; Pearson v. Knight Templars' and Masons' Life Indemnity Ins. Co., 89 S. W. 588, 114 Mo. App. 283; Gruwell v. National Council Knights and Ladies of Security, 104 S. W. 884, 126 Mo. App. 496; Gallop v. Royal Neighbors of America, 167 Mo.

App. 85, 150 S. W. 1118; *Kennedy v. The Grand Fraternity*, 92 Pac. 971, 36 Mont. 325, 25 L. R. A. (N. S.) 78; *Galvin v. Knights of Father Mathew*, 155 S. W. 45, 169 Mo. App. 496; *Gibbs v. Knights of Pythias of Missouri*, 173 Mo. App. 34, 158 S. W. 11; *Claudy v. Royal League*, 168 S. W. 593, 259 Mo. 92; *Daffron v. Modern Woodmen of America*, 190 Mo. App. 303, 176 S. W. 498; *Newman v. Supreme Lodge, Knights of Pythias*, 110 Miss. 371, 70 South. 241, L. R. A. 1916C, 1051; *Downs v. Knights of Columbus*, 76 N. H. 165, 80 Atl. 227; *Butler v. Supreme Council, A. L. H.*, 93 N. Y. Supp. 1012, 105 App. Div. 164; *Modern Brotherhood of America v. Bes-hara*, 142 Pac. 1014, 42 Okl. 684; *Haywood v. Grand Lodge of Texas, K. P. (Tex. Civ. App.)* 138 S. W. 1194; *Modern Woodmen of America v. Lynch (Tex. Civ. App.)* 141 S. W. 1055; *Eminent Household of Columbian Woodmen v. Hancock (Tex. Civ. App.)* 174 S. W. 657; *Marshall v. Locomotive Engineers' Mut. Life & Accident Ins. Ass'n (W. Va.)* 90 S. E. 847; *Thomas v. Covert*, 126 Wis. 593, 105 N. W. 922, 3 L. R. A. (N. S.) 904, 5 Ann. Cas. 458. But an application for life insurance in a fraternal order being made part of the contract by its own terms, by the constitution of the order, and in the petition asking for recovery on the policy, it is error to charge the jury that the constitution and by-laws constitute the contract. *Grand Lodge of Brotherhood of Railroad Trainmen v. Daly*, 31 Ohio Cir. Ct. R. 391.

The failure of a mutual benefit accident insurance company to inform a new member that its by-laws had been amended to reduce the period within which death must occur to render the insurer liable does not invalidate the by-law in absence of fraud or estoppel (*Hunt v. Iowa State Traveling Men's Ass'n [Iowa]* 160 N. W. 284). And where a mutual assessment company sets out in certificate synopsis of by-laws, leading insured to believe that it contains all provisions applicable, insured may rely on such synopsis, and company is estopped to deny liability under a by-law which insured was led to overlook or believe had no application (*Bierbach v. Mutual Benefit Health & Accident Ass'n [Wis.]* 161 N. W. 251).

A beneficiary, not a member of the insuring order, is not bound by its rules or regulations as to procedure in the enforcement of his claim. *Hann v. Supreme Ruling of the Fraternal Mystic Circle*, 140 N. Y. Supp. 666, 155 App. Div. 665.

In order that the insured may take advantage of the provisions of the constitution and by-laws, such provisions must be pleaded and proved.

Barrows v. Mutual Reserve Life Ins. Co., 151 Fed. 461, 81 C. C. A. 71; *Schack v. Supreme Lodge of the Fraternal Brotherhood*, 99

Pac. 989, 9 Cal. App. 584; *Social Benev. Soc. No. 1 v. Holmes*, 58 S. E. 775, 127 Ga. 586. But see *Court of Honor v. Hutchens* (Ind. App.) 79 N. E. 409. Where an action against a fraternal benefit association was grounded on its by-laws, the complaint was defective for alleging the by-laws in force when the action was commenced, and not at insured's death, more than a year theretofore. *Wingersky v. United States Grand Lodge, I. O. F. S. I.*, 128 N. Y. Supp. 74.

700 (f). In Kentucky and Pennsylvania it has been held that under the statutes of those states provisions of the constitution or by-laws of the association must be attached to the certificate, in order that they may be admissible in evidence as part of the contract.

Masonic Life Ass'n of Western New York v. Robinson, 147 S. W. 882, 149 Ky. 80, 41 L. R. A. (N. S.) 505; *Home Protective Ass'n v. Williams*, 150 S. W. 11, 150 Ky. 134, judgment reversed 151 S. W. 361, 151 Ky. 146, Ann. Cas. 1915A, 260; *American Patriots v. Cavanaugh*, 157 S. W. 1099, 154 Ky. 653; *Mowry v. National Protective Soc.*, 27 Pa. Super. Ct. 390. But see *Marcus v. Heralds of Liberty*, 241 Pa. 429, 88 Atl. 678, holding that a certificate of membership in a beneficial association is not an "insurance policy" within Act of May 11, 1881 (P. L. 20), making by-laws inadmissible in evidence unless attached to the policy. And it has also been held in Pennsylvania that the statute applies where a beneficial association issues a straight life policy. *Helmbold v. Independent Order of Puritans*, 61 Pa. Super. Ct. 164.

So, under the Kentucky statute of 1903 (section 679), requiring the by-laws of the mutual benefit association to be attached to and made a part of the certificate, the delivery of a copy of the by-laws of the insured at the time of the delivery of the certificate is insufficient (*Bankers' Fraternal Union v. Donahue* [Ky.] 109 S. W. 878). The Kentucky statute was, however, amended by Act March 24, 1906 (Acts 1906, c. 141), so as to make it inapplicable to fraternal benefit societies. Such amendment does not, of course, affect then existing contracts (*Ferlage v. Supreme Tribe of Ben Hur*, 153 Ky. 645, 156 S. W. 139).

On the other hand, it has been held in Georgia, Minnesota, and New York that benevolent fraternal associations are not subject to the statutes requiring by-laws, etc., to be attached to the policy.

Supreme Ruling of Fraternal Mystic Circle v. Blackshear, 13 Ga. App. 329, 79 S. E. 210; *Sovereign Camp of Woodmen of the World v. Keen*, 16 Ga. App. 703, 86 S. E. 88; *Louden v. Modern Brotherhood of America*, 107 Minn. 12, 119 N. W. 425; *Hoff v. Supreme*

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Lodge Knights of Pythias, 161 N. Y. Supp. 1012, 98 Misc. Rep. 61, judgment affirmed *Same v. Hoff*, 61 N. Y. Supp. 520, 175 App. Div. 40.

And in Virginia it is held that Code 1904, § 3252, providing that in an action on an insurance policy no failure to perform any condition of the policy, nor violation of any restrictive provision thereof, shall be a valid defense, unless such condition or provision is printed in type as large as or larger than that commonly known as "long primer" type, or is written with pen and ink in or on the policy, is not applicable to conditions in the by-laws of a mutual benefit society, which are by the terms of the certificate made a part of the contract (*Fraternalities Acc. Order v. Armstrong*, 56 S. E. 565, 106 Va. 746).

In *Muetzel v. Travelers' Protective Ass'n*, 168 Ky. 734, 183 S. W. 499, it was held that Ky. St. § 679, providing that the by-laws, etc., referred to in an insurance policy or certificate, must be attached thereto as a condition to being considered as part of the contract, does not apply to cases where it is necessary to resort to them to ascertain the engagements of one of the parties, or an essential element of the supposed contract, such as the insurer's agreement to pay. Such section does not apply where it is necessary to resort to unattached by-laws and constitution of a mutual benefit association only to determine the amount of disability benefits agreed to be paid.

The statutory provisions, however, requiring that copies of provisions of the constitution and by-laws shall be attached to the certificate in order to become part of the contract, are not retroactive, but apply only to certificates issued after the passage of such statutes.

American Gullid v. Wyatt, 125 Ky. 44, 100 S. W. 266, 30 Ky. Law Rep. 632; *Grand Lodge, A. O. U. W. of Kentucky v. Denzer*, 129 Ky. 202, 110 S. W. 882, 33 Ky. Law Rep. 643.

A statute repealing a statute declaring that by-laws of a fraternal benefit association are without effect unless attached to the certificate cannot affect rights of a beneficiary accruing prior to the repeal (*Supreme Council Catholic Knights of America v. Logsdon*, 183 Ind. 183, 108 N. E. 587).

701-703. (g) Same—Construction

701 (g). In construing the rules and laws of a mutual benefit association, the court will put upon them a liberal construction,

and, if possible, give to the language such meaning as will carry out the manifest intent of the parties.

Mund v. Rehaume, 51 Colo. 129, 117 Pac. 159, Ann. Cas. 1913A, 1243; *Brotherhood of Locomotive Firemen and Enginemen v. Corder*, 52 Ind. App. 214, 97 N. E. 125; *Clark v. Iowa State Traveling Men's Ass'n*, 156 Iowa, 201, 135 N. W. 1114, 42 L. R. A. (N. S.) 631; *Grand Lodge A. O. U. W. of Kansas v. Smith*, 92 Pac. 710, 76 Kan. 509; *Anderson v. Royal League*, 153 N. W. 853, 130 Minn. 416, L. R. A. 1916B, 901, Ann. Cas. 1917C, 691; *Grand Lodge (Colored) K. P. of Mississippi v. Jones*, 100 Miss. 467, 56 South. 458; *Lange v. Royal Highlanders*, 75 Neb. 188, 106 N. W. 224, 110 N. W. 1110, 10 L. R. A. [N. S.] 666, 121 Am. St. Rep. 786; *Briggs v. Royal Highlanders*, 84 Neb. 834, 122 N. W. 69; *Roth v. Travelers' Protective Ass'n of America*, 102 Tex. 241, 115 S. W. 31, 132 Am. St. Rep. 871, 20 Ann. Cas. 97.

But the rule requiring a liberal interpretation of the by-laws of a fraternal association in favor of the beneficiary does not require or permit a strained construction of language at variance with its obvious meaning (*Grand Lodge, A. O. U. W. of Kansas v. Crandall*, 102 Pac. 843, 80 Kan. 332). The by-laws of a benefit insurance society cannot, of course, be inconsistent with the charter (*Sinclair v. Fitzpatrick*, 138 N. Y. S. 272, 78 Misc. Rep. 60). And, if there is a conflict between the constitution of a mutual benefit association and its by-laws, the constitutional provision will govern (*Roulo v. Schiller Bund*, 172 Mich. 557, 138 N. W. 244).

A by-law of a beneficial association, purporting to give the general president authority finally to construe the laws of the association and decide all questions arising thereunder, relates only to the construction of such by-laws and the decision of such questions as concerned the government of the association and the general conduct of its affairs, and not as investing such officer with the power finally to determine the contract liability of the association to its members. In so far as such a by-law purports to limit its liability and obligates a member to abide the decision of such officer in the construction of such by-law, it is invalid as an attempt to usurp the judicial functions of government (*Fraternal Aid Ass'n v. Hitchcock*, 121 Ill. App. 402).

702 (g). Under the general rule that all papers in *pari materia* must be read together, a proper determination of the rights of a member of a mutual benefit association can be had only by construing together the certificate and the constitution, by-laws, and rules.

Supreme Royal Circle of Friends of the World v. Morrison, 105 Ark. 140, 150 S. W. 581; *Ryan v. Knights of Columbus*, 72 Atl. 574,

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82 Conn. 91; *Downs v. Knights of Columbus*, 76 N. H. 165, 80 Atl. 227; *Lyons v. Grand Lodge K. P. of North Carolina*, 172 N. C. 408, 90 S. E. 423; *Marshall v. Locomotive Engineers' Mut. Life & Accident Ins. Ass'n (W. Va.)* 90 S. E. 847; *Polk v. Mutual Reserve Fund Life Ass'n (C. C.)* 137 Fed. 273.

A by-law of an insurer, being one of the terms of its contract, can have no greater effect than if a similar provision were in its policy (*Downs v. Knights of Columbus*, 80 Atl. 227, 76 N. H. 165). If there is a conflict between the certificate and the by-laws, it will be determined by the terms of the certificate, and the rights and liabilities of the parties controlled by the certificate rather than the by-laws.

Runyan v. Runyan, 101 Ark. 353, 142 S. W. 519; *Clarke v. Illinois Commercial Men's Ass'n*, 180 Ill. App. 300; *Courtney v. Fidelity Mut. Aid Ass'n*, 94 S. W. 768, 101 S. W. 1098, 120 Mo. App. 110; *Stirn v. Supreme Lodge, Bohemian Slavonian Benev. Society*, 150 Wis. 13, 136 N. W. 164.

703-706. (h) Extent to which members of mutual benefit associations are bound by subsequent by-laws, etc.

703 (h). It may be conceded that a mutual benefit association, as an incident to its existence, has the general power to alter or amend its laws or to repeal them.

Pold v. North American Union, 180 Ill. App. 448, judgment affirmed 104 N. E. 4, 261 Ill. 433; *Gifford v. Workmen's Ben. Ass'n*, 105 Me. 17, 72 Atl. 680, 17 Ann. Cas. 1173; *Clayton v. Supreme Conclave, Improved Order of Heptasophs*, 130 Md. 31, 99 Atl. 949; *Newman v. Supreme Lodge, K. P.*, 110 Miss. 371, 70 South. 241, L. R. A. 1916C, 1051; *Green v. Supreme Council of Royal Arcanum*, 144 App. Div. 761, 129 N. Y. Supp. 791; *Faso v. La Cerdese Commodore Vito La Mantia Society*, 156 N. Y. Supp. 1090, 93 Misc. Rep. 163; *Conner v. Supreme Commandery Golden Cross*, 117 Tenn. 549, 97 S. W. 306. Gen. Laws 1907, c. 345, § 21, authorizing benefit associations to include in their by-laws certain provisions, having been enacted subsequent to the adoption of the by-laws of the association in question, and subsequent to the time when the rights of parties in benefit certificates had in part accrued, has no application, and did not affect by-laws previously enacted. *Leland v. Modern Samaritans*, 111 Minn. 207, 126 N. W. 728.

A by-law providing that mysterious disappearance with unexplained absence of member should not be considered proof or evidence of his death, in trial of action upon certificate issued before its adoption, did not prevent application of usual rule that unexplained absence under certain circumstances raises presumption of

death (*Hannon v. Grand Lodge A. O. U. W. of Kansas*, 99 Kan. 734, 163 P. 169, L. R. A. 1917C, 1029).

A statute declaring that changes in by-laws of a fraternal benefit association incorporated by special act reserving to the Legislature the right to amend shall be without effect unless attached to the certificate is constitutional (*Supreme Council Catholic Knights of America v. Logsdon*, 183 Ind. 183, 108 N. E. 587).

704 (h). It is obvious, however, that independent of any other consideration a member can be bound by an amendment or a new law only when such amendment or new law is adopted in accordance with the law of the association.

Cerny v. Jednota Cesky Dam, 146 Ill. App. 518; *Same v. Sesterska Podporujici Jednota*, Id. 590; *Apltz v. Supreme Lodge, Knights & Ladies of Honor*, 196 Ill. App. 278, affirmed 274 Ill. 196, 113 N. E. 63, L. R. A. 1917A, 183; *Fort v. Iowa Legion of Honor*, 146 Iowa, 183, 123 N. W. 224; *Gifford v. Workmen's Ben. Ass'n*, 72 Atl. 680, 105 Me. 17, 17 Ann. Cas. 1173; *Lange v. Royal Highlanders*, 106 N. W. 224, 75 Neb. 188, 10 L. R. A. (N. S.) 666, 121 Am. St. Rep. 786, affirmed on rehearing 110 N. W. 1110, 75 Neb. 188, 10 L. R. A. (N. S.) 666, 121 Am. St. Rep. 786; *Briggs v. Royal Highlanders*, 84 Neb. 834, 122 N. W. 69.

Amendments to the constitution of a mutual benefit society must be adopted in substantial accordance with the provisions of the constitution relative thereto and in force at the time (*Dick v. General Assembly of Order of Amaranth*, 113 N. W. 1125, 150 Mich. 215).

It is obvious that, if the exercise of corporate powers by a beneficial association has been regulated by statute, the corporation cannot by its by-laws or resolutions change the mode of the exercise of this power (*Lange v. Royal Highlanders*, 106 N. W. 224, 75 Neb. 188, 10 L. R. A. [N. S.] 666, 121 Am. St. Rep. 786, affirmed on rehearing 110 N. W. 1110, 75 Neb. 188, 10 L. R. A. [N. S.] 666, 121 Am. St. Rep. 786). So in the case cited it was held that if at the time a certificate of association was issued by the Auditor of State under *Cobbey's Ann. St. 1903*, § 6502, the statute requiring such societies to have a representative form of government had not been enacted, and after the enactment of such latter statute an edict was issued by a body in control of such society, which was not a representative body as required by *Cobbey's Ann. St. 1903*, § 6483, but an unauthorized body, such edict was, as against a member who received his certificate of membership prior to the adoption of such edict, ultra vires, void, and subject to an attack wherever found. And in *Johnson v. Bankers' Union of the World*, 83

Neb. 48, 118 N. W. 1104, it was held that, if a fraternal benefit association has not complied with Acts 1897, p. 266, c. 47, § 1, and adopted a representative form of government, its governing body is without power to adopt a constitution or by-law, or to amend the same, changing the terms and obligations of a certificate theretofore issued to one of its members. So, too, in *Briggs v. Royal Highlanders*, 84 Neb. 834, 122 N. W. 69, it was held that the governing body of a fraternal benefit society, which has not complied with Acts 1897, p. 266, c. 47, § 1, and adopted a representative form of government, is without power to adopt a by-law changing the terms and obligations of a benefit certificate theretofore issued. And where, under the constitution and by-laws of a fraternal benefit society, the delegates to the governing body thereof, elected by members of the society, cannot of themselves, and without the participation of members of committees appointed from members other than such delegates, legally and of right adopt or amend the by-laws of the society and absolutely control its government, such governing body is not a representative body, and the society cannot be said to have a representative form of government. Where a member of a mutual benefit society agreed when he joined that he would comply with all the laws, regulations, and requirements which had been, or might be, enacted by the order as a condition to his right to participate in the beneficiary fund, and during his membership jurisdiction over his local lodge was transferred to a new grand lodge organized in his own state, to exercise jurisdiction over all the local lodges in that state, he was bound to comply with the laws and regulations subsequently made by such grand lodge the same as though they had been made by the grand lodge having original jurisdiction (*Grand Lodge A. O. U. W. of Connecticut v. Burns*, 80 Atl. 157, 84 Conn. 356).

Where the certificate was issued by an Illinois association, and accepted by a member who then, and when he died, resided in that state, the extent to which the insured is bound by subsequently enacted by-laws will be determined by the laws of Illinois (*Kavanaugh v. Supreme Council of Royal League*, 158 Mo. App. 234, 138 S. W. 359).

706 (h). Amendments to the constitution and by-laws, or new by-laws, will be construed as operating prospectively, unless the intention to make them retroactive is clearly shown by clauses having that effect.

Benjamin v. Mutual Reserve Fund Life Ass'n, 146 Cal. 34, 79 Pac. 517; *Guthrie v. Supreme Tent, Knights of the Maccabees of the*

World, 4 Cal. App. 184, 87 Pac. 405; Schack v. Supreme Lodge, Fraternal Brotherhood, 9 Cal. App. 534, 99 Pac. 989; Linneweber v. Supreme Council, Catholic Knights of America, 158 Pac. 229, 30 Cal. App. 315; Head Camp, Woodmen of the World, v. Irish, 23 Colo. App. 85, 127 Pac. 918; Emmons v. Grand Lodge A. O. U. W. of Delaware, 4 Boyce (Del.) 272, 88 Atl. 459; Fraternal Relief Ass'n v. Edwards, 9 Ga. App. 43, 70 S. E. 265; Cigar Makers' International Union of America v. Huecker, 123 Ill. App. 336; Kaemmerer v. Kaemmerer, 137 Ill. App. 28, judgment affirmed 83 N. E. 133, 231 Ill. 154; Haley v. Supreme Court of Honor, 130 Ill. App. 478; Mathieu v. Mathieu, 112 Md. 625, 77 Atl. 112; Dolan v. Supreme Council, Catholic Mut. Ben. Ass'n, 152 Mich. 266, 116 N. W. 383, 16 L. R. A. (N. S.) 555, 15 Ann. Cas. 232, overruling on rehearing 113 N. W. 10, 13 L. R. A. (N. S.) 424; Samberg v. Knights of the Modern Maccabees, 158 Mich. 568, 123 N. W. 25, 133 Am. St. Rep. 396; Ruder v. National Council, Knights and Ladies of Security, 145 N. W. 118, 124 Minn. 431; Butler v. Supreme Council, A. L. H., 105 App. Div. 164, 93 N. Y. Supp. 1012; Sinclair v. Fitzpatrick, 78 Misc. Rep. 60, 138 N. Y. Supp. 272; Palmer v. Protected Home Circle, 97 Atl. 188, 252 Pa. 201; Smith v. Our United Brotherhood (Tex. Civ. App.) 191 S. W. 199; Jaeger v. Grand Lodge of Order of Hermann's Sons, 135 N. W. 860, 149 Wis. 354, 39 L. R. A. (N. S.) 494.

A by-law of a fraternal benefit society providing for the suspension of a member for engaging in a prohibited occupation held not to apply to a member who engaged in the occupation before the by-law was adopted. Zeman v. North American Union, 105 N. E. 22, 263 Ill. 304, affirming judgment 181 Ill. App. 551.

But see the following cases, holding particular by-laws to apply to existing contracts: Dessauer v. Supreme Tent of Knights of Maccabees of the World, 191 Mo. App. 76, 176 S. W. 461 (relating to suicide); Cunningham v. Supreme Council of Royal Arcanum, 165 App. Div. 52, 151 N. Y. Supp. 83 (relating to expulsion of members); Faulk v. Fraternal Mystic Circle, 88 S. E. 431, 171 N. C. 301 (limitation of actions). A by-law passed after the issuance of a benefit certificate forfeiting the certificate for death from the use of intoxicating liquor is valid. Curtis v. Modern Woodmen of America, 159 Wis. 303, 150 N. W. 417.

Where a benefit certificate is issued at the time of the existence of a by-law making the certificate incontestable after three years, except for a misrepresentation as to age, or nonpayment of dues, and later a by-law was adopted which repealed the former by-law and provided that the certificate shall be void if the member commits suicide at any time, held, that the insurer by issuing a new certificate to the member after the adoption of the latter by-law, containing the same incontestable clause as in the former certificate,

construed the latter by-law as prospective only (*Marshall v. Modern American Fraternal Order*, 184 Ill. App. 224).

A certificate provision giving the holder of a benefit certificate the right to cease payments and receive a paid-up certificate is not affected by repeal of a by-law to the same effect. *Bass v. Life & Annuity Ass'n*, 96 Kan. 206, 150 Pac. 588, judgment affirmed on rehearing 96 Kan. 398, 151 Pac. 1117.

There is no presumption that by-laws of a beneficial association, which in an action on a benefit certificate appear, by the association's evidence, to have been enacted years after the issuance of the certificate, were in force when the certificate was issued, so as to be binding on the member (*Masonic Ben. Ass'n v. Hoskins*, 99 Miss. 812, 56 South. 169).

Where the benefit certificate was conditioned on the insured complying with the law then in force, or to be thereafter adopted, and a plea alleged that after the issuance of the certificate a new by-law was enacted, a demurrer to the plea admitted the regular enactment of the new law, so that it became retroactive, except as to rights which had become vested (*Plunkett v. Supreme Conclave, Improved Order of Heptasophs*, 105 Va. 643, 55 S. E. 9). If the constitution and laws of the association are introduced in evidence, the burden is on the plaintiff to show any change in such laws subsequent to the issuance of a certificate (*United Moderns v. Rathbun*, 104 Va. 736, 52 S. E. 552). A request to find that a provision in the constitution of a benefit association had not been adopted or approved by the Supreme Council, and that its publication was unauthorized, was properly refused in view of the fact that thousands of the pamphlets containing it had been sent to members (*Dowdall v. Supreme Council of Catholic Mut. Ben. Ass'n*, 89 N. E. 1075, 196 N. Y. 405, 31 L. R. A. [N. S.] 417, reversing 123 App. Div. 913, 108 N. Y. Supp. 1130).

706-707. (1) Same—Assent of member

706 (i). Whether or not a member is otherwise bound by subsequent by-laws, he will, of course, be bound if he consents thereto (*Breslow v. Southern Tier Masonic Relief Ass'n*, 107 App. Div. 123, 94 N. Y. Supp. 787). Conversely, other things being equal, such by-laws will not be binding, unless assented to.

Fort v. Iowa Legion of Honor, 146 Iowa, 183, 123 N. W. 224; *Butler v. Supreme Council, A. L. H.*, 93 N. Y. Supp. 1012, 105 App. Div. 164.

707 (i). In the absence of evidence to the contrary, it will be presumed that each member of a mutual benefit association has notice of a change in the by-laws, where a notice of such change was sent to each subordinate lodge and the conditions leading up to the change had been the subject of previous discussions (*Attorney General v. Supreme Council, A. L. H.*, 206 Mass. 168, 92 N. E. 140). In the same case it was held that a member of the association, who protests against the validity of the new by-law, and who notifies the association that he intends to insist upon his rights, thereby preserves his rights under the certificate. A beneficiary cannot object to amendments to the articles of association of a fraternal benefit society because they were not properly referred to the subordinate councils, where the evidence shows they were submitted to the subordinate councils and passed by a proper majority (*Pold v. North American Union*, 180 Ill. App. 448, judgment affirmed 104 N. E. 4, 261 Ill. 433). A mutual benefit accident insurance company is not required, in absence of fraud or estoppel, to inform a member of a proposed amendment in its by-laws reducing the period within which death must occur after the accident to render the insurer liable (*Hunt v. Iowa State Traveling Men's Ass'n [Iowa]* 160 N. W. 284). Although the members of a mutual insurance society are bound to take notice of and be governed by its laws, whether adopted prior or subsequent to contract, it is competent for parties to contract to stipulate what alone shall be legal notice of change (*Gibson v. Iowa Legion of Honor [Iowa]* 159 N. W. 639).

Naturally one of the questions which may arise is: "What constitutes consent to the new by-law?" If the member, after the amendment of the by-laws surrenders his original certificate and accepts a new one, this will be regarded as a consent to the amended by-laws in force at the time of the acceptance of the new certificate (*Breslow v. Southern Tier Masonic Relief Ass'n*, 107 App. Div. 123, 94 N. Y. Supp. 787). A member of a benefit insurance society consented to, acquiesced in, and ratified changes in the constitution and by-laws by paying subsequent assessments without protest or objection.

Ankele v. Workingmen's Relief Societies, A. U. V. O. of Illinois, 182 Ill. App. 470; *Ferguson v. Grand Lodge of Iowa Legion of Honor*, 174 Iowa, 61, 156 N. W. 176; *Niemyjski v. Schlesinger*, 154 N. Y. Supp. 219, 91 Misc. Rep. 50.

The fact, however, that the representative from a local lodge was in attendance at the meeting of a superior lodge when the amend-

ment to the by-laws was adopted does not operate as a consent to such amendment on the part of the member (*Fargo v. Supreme Tent Knights of Maccabees*, 185 N. Y. 578, 78 N. E. 1103, affirming 96 App. Div. 491, 89 N. Y. Supp. 65). That a member of a beneficial association knows that the by-laws have been amended, or that he voted for the amendments, does not conclusively show his consent that they may have retroactive force to modify his contract (*Sheetz v. Protected Home Circle*, 256 Pa. 172, 100 Atl. 749).

Whether a member of a mutual benefit society had notice of and acquiesced in amendments to the constitution and laws thereof, so that the regularity of their adoption could not be questioned in an action on the certificate, is a question of fact for the jury. *Dick v. General Assembly of Order of Amaranth*, 113 N. W. 1125, 150 Mich. 215. The sufficiency of the evidence to establish notice of the amendment of a by-law is considered in *Brown v. Knights of the Protected Ark*, 43 Colo. 289, 96 Pac. 450.

708. (j) Same—Effect of reservation of right to amend

708 (j). It has been conceded in some cases that, unless the right to amend the constitution and by-laws is expressly reserved, either in those instruments or in the certificate, the association will have no power to so amend its laws as to affect the contract rights of the members (*Edwards v. American Patriots*, 144 S. W. 1117, 162 Mo. App. 231). On the other hand, it is a general rule that, if the right to amend the laws is expressly reserved, the association is authorized to make any alterations in its laws that may seem necessary for the good of the association, and the member will be bound thereby, though it injuriously affects his interests.

Smythe v. Supreme Lodge, K. P. (D. C.) 198 Fed. 967; *Ellison v. District Grand Lodge, No. 23, Grand United Order of Odd Fellows*, 11 Ala. App. 442, 66 South. 872; *Knights of Pythias of North America v. Long*, 117 Ark. 136, 174 S. W. 1197; *Eminent Household of Columbian Woodmen v. Hewitt*, 184 S. W. 52, 122 Ark. 480; *Head Camp, Pacific Jurisdiction, Woodmen of the World, v. Woods*, 81 Pac. 261, 34 Colo. 1; *Head Camp, Pacific Jurisdiction, Woodmen of the World, v. Irish*, 23 Colo. App. 85, 127 Pac. 918; *Kane v. Knights of Columbus*, 84 Conn. 96, 79 Atl. 63; *Fraternal Relief Ass'n v. Edwards*, 9 Ga. App. 43, 70 S. E. 265; *Murphy v. Nowak*, 79 N. E. 112, 223 Ill. 301, 7 L. R. A. (N. S.) 393; *Supreme Council of Royal Arcanum v. McKnight*, 238 Ill. 349, 87 N. E. 299, reversing decree, 140 Ill. App. 421; *Cigar Makers' International Union of America v. Huecker*, 123 Ill. App. 336; *Smith v. Mutual Reserve Fund Life Ass'n*, 140 Ill. App. 409; *Moses v. Illinois Commercial Men's Ass'n*, 189 Ill. App. 440; *Court of Honor v. Hutchens* (Ind. App.) 79 N. E. 409; *Norton v. Catholic Order of Foresters*, 138 Iowa, 464, 114 N. W. 893, 24 L. R. A.

(N. S.) 1030; *House v. Modern Woodmen of America*, 165 Iowa, 607, 146 N. W. 817; *Ledy v. National Council of Knights and Ladies of Security*, 129 Minn. 137, 151 N. W. 905, Ann. Cas. 1916E, 486; *Green v. Supreme Council of Royal Arcanum*, 144 App. Div. 761, 129 N. Y. Supp. 791, reversing 124 N. Y. Supp. 398; *Cipriano v. Societa San Salvatore*, 161 N. Y. Supp. 284, reversing judgment 157 N. Y. Supp. 467, 94 Misc. Rep. 130; *McGovern v. Brotherhood of Locomotive Firemen and Engineers*, 31 Ohio Cir. Ct. R. 243; *Conner v. Supreme Commandery Golden Cross*, 117 Tenn. 549, 97 S. W. 306; *United Benev. Ass'n v. Cass*, 54 Tex. Civ. App. 628, 119 S. W. 123; *Klein v. Knights and Ladies of Security*, 79 Wash. 173, 140 Pac. 72.

This general statement must, however, be limited to such amendments and alterations as are reasonable and do not impair contract rights.

Smythe v. Supreme Lodge, K. P. (D. C.) 198 Fed. 967; *Fraternal Union of America v. Zelgler*, 145 Ala. 287, 39 South. 751; *Kane v. Knights of Columbus*, 84 Conn. 96, 79 Atl. 63; *Moses v. Illinois Commercial Men's Ass'n*, 189 Ill. App. 440; *Ury v. Modern Woodmen*, 149 Iowa, 706, 127 N. W. 665; *Green v. Supreme Council of Royal Arcanum*, 144 App. Div. 761, 129 N. Y. Supp. 791, reversing 124 N. Y. Supp. 398.

708-711. (k) Same—Effect of agreement to be bound by laws subsequently enacted

709 (k). It is undoubtedly competent for the parties to make contracts with reference to by-laws then existing or which might thereafter be adopted, and if an agreement to the effect that the member will be bound by laws then existing or thereafter enacted is contained in the contract, both the member and his beneficiary will be bound by laws of the association adopted after the membership was acquired.

Supreme Lodge of Fraternal Union of America v. Light, 195 Fed. 903, 115 O. C. A. 591; *Smythe v. Supreme Lodge, K. P. (D. C.)* 198 Fed. 967; *Caldwell v. Grand Lodge of United Workmen*, 148 Cal. 195, 82 Pac. 781, 2 L. R. A. (N. S.) 653, 113 Am. St. Rep. 219, 7 Ann. Cas. 356; *Coughlin v. Knights of Columbus*, 64 Atl. 223, 79 Conn. 218; *Kane v. Knights of Columbus*, 84 Conn. 96, 79 Atl. 63; *Grand Lodge A. O. U. W. v. Burns*, 84 Conn. 356, 80 Atl. 157; *Union Fraternal League of Boston v. Johnston*, 53 S. E. 241, 124 Ga. 902; *Scow v. Supreme Council of Royal League*, 223 Ill. 32, 79 N. E. 42; *Kaemmerer v. Kaemmerer*, 231 Ill. 154, 83 N. E. 133; *Supreme Council of Royal Arcanum v. McKnight*, 238 Ill. 349, 87 N. E. 299, reversing decree 140 Ill. App. 421; *Grand Lodge A. O. U. W. v. Oetzel*, 139 Ill. App. 4; *Smith v. Mutual Reserve Fund Life Ass'n*, 140 Ill. App. 409; *Pierce v. Bankers' Union*, 140

Ill. App. 495; *Royal League v. Kolin*, 169 Ill. App. 646; *Norton v. Catholic Order of Foresters*, 138 Iowa, 464, 114 N. W. 893, 24 L. R. A. (N. S.) 1030; *Pride v. Switchmen's Union of North America*, 178 Ill. App. 434; *Pold v. North American Union*, 104 N. E. 4, 261 Ill. 433, affirming 180 Ill. App. 448; *Kirk v. Fraternal Aid Ass'n*, 149 Pac. 400, 95 Kan. 707; *Mathieu v. Mathieu*, 77 Atl. 112, 112 Md. 625; *Arold v. Supreme Conclave, Improved Order of Heptasophs*, 91 Atl. 829, 123 Md. 675; *Williams v. Supreme Council of Catholic Mut. Ben. Ass'n*, 152 Mich. 1, 115 N. W. 1060; *Claudy v. Royal League*, 168 S. W. 593, 259 Mo. 92; *Lange v. Royal Highlanders*, 75 Neb. 188, 106 N. W. 224, 110 N. W. 1110, 10 L. R. A. (N. S.) 666, 121 Am. St. Rep. 786; *Poole v. Supreme Circle, Brotherhood of America* (N. J.) 85 Atl. 821, decree affirmed 87 Atl. 1118, 80 N. J. Eq. 259; *Glenty v. Knights of Columbus*, 126 App. Div. 934, 110 N. Y. Supp. 1129, affirming 55 Misc. Rep. 98, 105 N. Y. Supp. 244; *Tisch v. Protected Home Circle*, 72 Ohio St. 233, 74 N. E. 188; *Hines v. Modern Woodmen of America*, 41 Okl. 135, 137 Pac. 675, L. R. A. 1915A, 264; *Eaton v. International Travelers' Ass'n* (Tex. Civ. App.) 136 S. W. 817; *Modern Woodmen of America v. Lynch* (Tex. Civ. App.) 141 S. W. 1065; *Plunkett v. Supreme Conclave, Improved Order of Heptasophs*, 105 Va. 643, 55 S. E. 9.

The mere provision in a certificate, issued by a beneficial association to a member, that any failure to comply with its laws and regulations as prescribed by its grand lodge shall forfeit his certificate, is not an express provision that he shall be bound by its by-laws thereafter enacted, without which he is not bound thereby (*Masonic Ben. Ass'n v. Hoskins*, 99 Miss. 812, 56 South. 169). Moreover, though future by-laws of an insurance association may by agreement be made a part of the policy issued by such association, yet the policy holder entering into such an agreement will be deemed to contemplate only such by-laws as the association has power to pass; that is, such only as are reasonable and consistent with the rights guaranteed to him by statute, and not by-laws attempted to be passed depriving him of valuable statutory rights (*Eaton v. International Travelers' Ass'n of Dallas* [Tex. Civ. App.] 136 S. W. 817). And the by-laws must of course be legally enacted (*Lange v. Royal Highlanders*, 106 N. W. 224, 75 Neb. 188, 10 L. R. A. [N. S.] 666, 121 Am. St. Rep. 786, affirmed on rehearing 110 N. W. 1110, 75 Neb. 188, 10 L. R. A. [N. S.] 666, 121 Am. St. Rep. 786). The right of the association to hold the insured to his agreement may, however, be waived. In *Boman v. Bankers' Union*, 76 Kan. 198, 91 Pac. 49, 11 L. R. A. (N. S.) 1048, the facts were these: A mutual benefit life insurance company issued a joint certificate

to plaintiff and his wife, the by-laws being made part of the contract. The company agreed to pay the survivor on proof of the death of the other \$1,000, subject to certain deductions provided by by-law. Thereafter the association passed a new by-law which would reduce the indemnity. Neither plaintiff nor his wife had knowledge of the same, but continued many months after the new by-law was passed to pay the monthly assessments, which the association received without objection. On the death of the wife the association offered plaintiff the amount he would be entitled to under the new by-law, but less than one-third the amount which he was entitled to under the former by-law. It was held that, though plaintiff and his wife may have agreed to be bound by subsequently enacted by-laws, the association had waived the enforcement of the new by-law, and could not assert it against plaintiff.

Under an agreement of the member of benefit society as to amendments of laws, the society is authorized to assess proportionate share of deficiency in funds against his certificate, as authorized by an act of Parliament of the Dominion of Canada, amending the act under which it was organized. *De Graw v. Supreme Court*, I. O. F., 148 N. W. 708.

711-713. (1) Same—Laws must be reasonable

711 (1). It must, however, be regarded as elementary that in order to bind a member, either under the general reservation of power to amend or under an agreement to be bound, the law must be reasonable.

Supreme Lodge of Fraternal Union of America v. Light, 195 Fed. 903, 115 C. C. A. 591; *Smythe v. Supreme Lodge*, K. P. (D. C.) 198 Fed. 967; *Fraternal Union of America v. Zeigler*, 145 Ala. 287, 39 South. 751; *Caldwell v. Grand Lodge of United Workmen of California*, 82 Pac. 781, 148 Cal. 195, 2 L. R. A. (N. S.) 653, 113 Am. St. Rep. 219, 7 App. Cas. 356; *Kane v. Knights of Columbus*, 84 Conn. 96, 79 Atl. 63; *Grand Lodge A. O. U. W. v. Burns*, 84 Conn. 350, 80 Atl. 157; *Smith v. Mutual Reserve Fund Life Ass'n*, 140 Ill. App. 409; *Apitz v. Supreme Lodge Knights and Ladies of Honor*, 196 Ill. App. 278, judgment affirmed 113 N. E. 63, 274 Ill. 196, L. R. A. 1917A, 183; *Ury v. Modern Woodmen*, 149 Iowa, 706, 127 N. W. 665; *Uhl v. Life & Annuity Ass'n*, 97 Kan. 422, 155 Pac. 926; *Mathieu v. Mathieu*, 112 Md. 625, 77 Atl. 112; *Lange v. Royal Highlanders*, 75 Neb. 188, 106 N. W. 224, 110 N. W. 1110, 10 L. R. A. (N. S.) 666, 121 Am. St. Rep. 786; *Parks v. Supreme Circle, Brotherhood of America*, 83 N. J. Eq. 131, 89 Atl. 1042; *Green v. Supreme Council of Royal Arcanum*, 144 App. Div. 761, 129 N. Y. Supp. 791, reversing 124 N. Y. Supp. 398; *Williams v. Supreme Conclave Improved Order of Heptasophs*, 172 N. C. 787,

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90 S. E. 888; *Eaton v. International Travelers' Ass'n* (Tex. Civ. App.) 136 S. W. 817.

712 (1). The real point at issue is whether a particular law is reasonable or unreasonable. No general rules for the determination of this question can be laid down.

The courts have pronounced reasonable amendments or new laws increasing the rate of assessment. *Pierce v. Bankers' Union of the World*, 140 Ill. App. 495; *Conner v. Supreme Commandery Golden Cross*, 117 Tenn. 549, 97 S. W. 306. Also a by-law providing for a reserve or a deficiency assessment, and making such assessment a lien against the policy. *Smith v. Mutual Reserve Fund Life Ass'n*, 140 Ill. App. 409. Also a by-law scaling a certificate in order to avoid bankruptcy and making a corresponding reduction in the assessment. *McCloskey v. Supreme Council, A. L. H.*, 109 App. Div. 309, 96 N. Y. Supp. 347. A by-law providing that a member who has fallen in arrears and paid up should not be entitled to benefits until six months therefrom. *Stanton v. Eccentric Ass'n of Firemen, Local Union No. 56, of International Brotherhood of Stationary Firemen*, 114 N. Y. Supp. 480, 130 App. Div. 129. A by-law suspending a member upon disappearance. *Royal Arcanum v. Vitzthum*, 128 Md. 523, 97 Atl. 923, L. R. A. 1917A, 179.

By-laws declaring a forfeiture or reducing the amount payable in case of suicide of the insured, have been held to be reasonable in *Fraternal Union of America v. Zeigler*, 39 South. 751, 145 Ala. 287; *Knights of Maccabees of the World v. Nelson*, 77 Kan. 629, 95 Pac. 1052; *Lange v. Royal Highlanders*, 106 N. W. 224, 75 Neb. 188, 10 L. R. A. (N. S.) 666, 121 Am. St. Rep. 786, affirmed on rehearing 110 N. W. 1110, 75 Neb. 188, 10 L. R. A. (N. S.) 666, 121 Am. St. Rep. 786.

A by-law placing the occupation of switchman in the extrahazardous class is reasonable. *Norton v. Catholic Order of Foresters*, 138 Iowa, 464, 114 N. W. 893, 24 L. R. A. (N. S.) 1030. By-laws which declare a forfeiture of the certificate if the members should engage in the manufacture and sale of intoxicating liquors have been declared reasonable in *Grand Lodge A. O. U. W. v. Burns*, 84 Conn. 356, 80 Atl. 157; *Supreme Lodge of Fraternal Union of America v. Light*, 195 Fed. 903, 115 C. C. A. 591; *Brown v. Great Camp of Knights of Modern Maccabees*, 167 Mich. 123, 132 N. W. 562; *Graves v. Knights of the Maccabees of the World*, 92 N. E. 792, 190 N. Y. 397, 139 Am. St. Rep. 912, reversing judgment 112 N. Y. Supp. 948, 128 App. Div. 600. So, too, a by-law exempting a society from liability in case a member's death resulted from the use of intoxicating liquors is reasonable. *Ury v. Modern Woodmen of America*, 149 Iowa, 706, 127 N. W. 665.

A by-law providing who shall be declared the beneficiary of a certificate on the failure of the insured to designate a new beneficiary,

the former beneficiary having died, is reasonable. *Dieterich v. Modern Woodmen*, 161 Mo. App. 97, 142 S. W. 460.

Where a by-law of a benefit society at the time a person became a member provided the society should not be liable to pay the benefits of members who commit suicide, whether sane or insane, "except it be committed in delirium resulting from illness, or while the member is under treatment for insanity or has been judicially declared insane," and thereafter a by-law was adopted making the society not liable in case of suicide whether sane or insane, without any exception, the subsequent by-law was not unreasonable, and the person becoming a member before its adoption was bound thereby. *Streep v. Mutual Protective League*, 186 Ill. App. 535.

On the other hand, the courts have declared unreasonable a by-law limiting the benefit in case of suicide to 5 per cent. of the face of the certificate for each year that the member "shall have been continuously a member of the association." *Olson v. Court of Honor*, 110 N. W. 374, 100 Minn. 117, 8 L. R. A. (N. S.) 521, 117 Am. St. Rep. 676, 10 Ann. Cas. 622.

Where a certificate provides that after a certain time it shall be non-forefetable and that the member shall be entitled to a paid-up certificate in proportion to payments made, a change in the laws of the society is unreasonable which denies him, unless he make further payments, any benefit from his admitted present share of the accumulated reserve fund. *Uhl v. Life & Annuity Ass'n*, 97 Kan. 422, 155 Pac. 926.

Where an assessment insurance certificate and the constitution of the association at the time the certificate was issued provided that whenever the death fund should be insufficient to meet existing claims an assessment should be made upon the "entire membership in force at the date of the last death, the same to be apportioned among the members according to the age of each member," subsequent resolutions of the association, classifying the members, and placing all the members who entered prior to a date subsequent to that at which the certificate was issued in a class by themselves, and providing that as to such members the assessments should be apportioned according to the age of the member, but as to members joining the association since that date the assessments should be apportioned as of the age of their entry into the association, were inoperative and void as against the holder of such certificate. *Benjamin v. Mutual Reserve Fund Life Ass'n*, 79 Pac. 517, 146 Cal. 34.

713-714. (m) Same—Purpose and effect of laws and the relation thereof to prior legislation

713 (m). As a further modification of the general principle, it has been conceded in some cases that the amendment or new law

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must be intended and effective for the good of the association as a whole, if not, indeed, essential to its continuance.

Reynolds v. Supreme Council Royal Arcanum, 192 Mass. 150, 78 N. E. 129, 7 L. R. A. (N. S.) 1154, 7 Ann. Cas. 776; *Supreme Ruling of Fraternal Mystic Circle v. Ericson* (Tex. Civ. App.) 131 S. W. 92. But see *Dowdall v. Supreme Council of Catholic Mut. Ben. Ass'n*, 196 N. Y. 403, 89 N. E. 1075, 31 L. R. A. (N. S.) 417, reversing 123 App. Div. 913, 108 N. Y. Supp. 1130.

So, too, the new law must be in harmony with the general policy of the association.

Reynolds v. Supreme Council Royal Arcanum, 192 Mass. 150, 78 N. E. 129, 7 L. R. A. (N. S.) 1154, 7 Ann. Cas. 776; *Mock v. Supreme Council of Royal Arcanum*, 121 App. Div. 474, 106 N. Y. Supp. 155; *Wright v. Knights of Maccabees*, 122 App. Div. 904, 106 N. Y. Supp. 1150; *Dieterich v. Modern Woodmen*, 161 Mo. App. 97, 142 S. W. 460; *Norton v. Catholic Order of Foresters*, 138 Iowa, 464, 114 N. W. 893, 24 L. R. A. (N. S.) 1030; *Dowdall v. Supreme Council, O. M. B. A.*, 123 App. Div. 913, 108 N. Y. Supp. 1130.

In determining whether by-law of fraternal benefit association enacted after member joined is reasonable, reference should be had to the nature and purpose of contract, read in light of objects of order. *Royal Arcanum v. Vitzthum*, 97 Atl. 923, 128 Md. 523, L. R. A. 1917A, 179.

Thus, where the by-laws of the association had already declared certain occupations to be prohibited as hazardous, a new by-law making a new classification was not out of harmony with the general policy of the association, and could not be regarded as impairing any vested rights (*Norton v. Catholic Order of Foresters*, 138 Iowa, 464, 114 N. W. 893, 24 L. R. A. [N. S.] 1030).

Similarly it has been held that a law imposing restrictions, which did not exist even by implication when the membership was acquired, is not binding.

Attorney General v. Supreme Council A. L. H., 196 Mass. 151, 81 N. E. 966; *Lewine v. Supreme Lodge Knights of Pythias*, 122 Mo. App. 547, 99 S. W. 821; *Young v. Railway Mail Ass'n*, 126 Mo. App. 325, 103 S. W. 557; *Ayers v. Grand Lodge A. O. U. W.*, 188 N. Y. 280, 80 N. E. 1020, affirming 109 App. Div. 919, 95 N. Y. Supp. 1112; *Butler v. Supreme Council A. L. H.*, 105 App. Div. 164, 93 N. Y. Supp. 1012; *Barrett v. Grand Lodge A. O. U. W.*, 63 Misc. Rep. 429, 117 N. Y. Supp. 125.

714 (m). The general principle that, under the reservation of the right to amend or an agreement to be bound, the member will be bound by subsequent by-laws, has been further modified by cases.

which have held that this reservation or agreement has no reference to matters of contract, but reference only to such amendments or laws as relate to the social and lodge features of the organization, or the general duties and conduct of the member (*Wilcox v. Court of Honor*, 134 Mo. App. 547, 114 S. W. 1155). On the other hand, in *Order of United Commercial Travelers v. Smith*, 192 Fed. 102, 112 C. C. A. 442, it was said that insured's agreement to abide by the constitution as it then was, or might thereafter be amended, did not limit his obligation with reference to amendments to those relating solely to disciplinary and social regulations, but included as well amendments dealing with the indemnity contract.

In other cases it has been said that the reservation or agreement to be bound refers only to such amendments or laws as relate to the forms and methods of business of the association.

Bornstein v. District Grand Lodge, No. 4, Independent Order of B'nai B'rith, 2 Cal. App. 624, 84 Pac. 271; *Monger v. New Era Ass'n*, 156 Mich. 645, 121 N. W. 823, 24 L. R. A. (N. S.) 1027; *Stirn v. Supreme Lodge of Bohemian Slavonian Benev. Society*, 150 Wis. 13, 136 N. W. 164.

This brings up the question, however, as to what may be fairly regarded as falling within the term "methods of business." The matter has been very thoroughly discussed in the important case of *Reynolds v. Supreme Council Royal Arcanum*, 192 Mass. 150, 78 N. E. 129, 7 L. R. A. (N. S.) 1154, 7 Ann. Cas. 776. This case involved the validity of an amendment to the laws of the Royal Arcanum increasing the rate of assessment. The court pointed out that a member of a mutual benefit association occupies a dual position in that he is both an insurer and an insured. As a member of the association agreeing to provide for the payment of death benefits that may become due to members he is an insurer, and as such it is his duty to provide for the payment of such benefits. Therefore by-laws the object and effect of which is to enforce this duty are valid laws and cannot be regarded as impairing any vested right. The same sort of a by-law was involved in *Supreme Ruling of Fraternal Mystic Circle v. Ericson* (Tex. Civ. App.) 131 S. W. 92. The court in that case also pointed out the dual relation existing between the members and the association, and, referring to the contention of the plaintiff that the power of amendment or enactment of new by-laws relates only to the business methods and the general duties of the members, says that as an insurer the member contracts that the certificates of all other members shall be paid and

agrees in advance to such changes in the by-laws as are necessary to meet such payments, and that consequently the most important "business method" with which such an association could be called upon to deal is the fixing of proper rates of assessment so as to be able to meet its obligations. The principles announced in these two cases also meet with approval in *Green v. Supreme Council of Royal Arcanum*, 144 App. Div. 761, 129 N. Y. Supp. 791, reversing 124 N. Y. Supp. 398. The decision in this case was, however, reversed by the Court of Appeals (*Green v. Supreme Council of Royal Arcanum*, 206 N. Y. 591, 100 N. E. 411); the court holding that the Massachusetts statute under which the mutual benefit corporation was organized, authorizing fraternal beneficiary organizations to change and amend their rate of assessment, does not apply to the assessment of a member whose contract with the corporation was entered into, made, and completed in New York. The theory of the court seemed to be that a by-law raising the rate of assessment impaired the member's rights under the contract. However, on appeal to the Supreme Court of the United States that court held in *Supreme Council Royal Arcanum v. Green*, 237 U. S. 531, 35 Sup. Ct. 724, 59 L. Ed. 1089, L. R. A. 1916A, 771, reversing 206 N. Y. 591, 100 N. E. 411, that the power of a Massachusetts mutual benefit society under its charter and by-laws to amend such by-laws so as to increase its assessment rates, and the rights and duties of the members of a New York subordinate council with respect to such increase, are to be determined by the Massachusetts law, under which, as construed by a judgment of the highest court of that state, such amendment is valid and violates no contract rights of the certificate holder.

The principles of the *Reynolds Case* are also approved in *Supreme Lodge K. of P. v. Mims*, 36 Sup. Ct. 702, 241 U. S. 574, 60 L. Ed. 1179, L. R. A. 1916F, 919, reversing judgment (Tex. Civ. App.) 167 S. W. 835; *Holt v. Supreme Lodge Knights of Pythias*, 235 Fed. 885, 149 C. C. A. 197; *Wagner v. Supreme Lodge, K. P.* (Ind. App.) 116 N. E. 91; *Moore v. Life & Annuity Ass'n*, 95 Kan. 591, 148 Pac. 981; *Clarkson v. Supreme Lodge K. P.*, 82 S. E. 1043, 99 S. C. 134; *Supreme Lodge of Fraternal Union of America v. Ray* (Tex. Civ. App.) 166 S. W. 46; *Thomas v. Knights of Maccabees of the World*, 85 Wash. 665, 149 Pac. 7, L. R. A. 1916A, 750, Ann. Cas. 1917B, 804.

Right of a Canadian benefit society, maintaining a subordinate court in New York, to increase rate of assessments on a member of New York court, is controlled by law of Canada. *McClement v. Supreme Court*, I. O. F., 154 N. Y. Supp. 700, 169 App. Div. 77, re-

versing judgment 152 N. Y. Supp. 136, 88 Misc. Rep. 475, and amendment of order denied 171 App. Div. 890, 155 N. Y. Supp. 1121.

715-719. (n) Same—Laws impairing contract or vested rights

715 (n). Even by a reservation of the right to amend or alter its laws, or an agreement by the member to be bound by laws thereafter enacted, an association cannot by such amendment or alteration impair the obligation of its contracts or deprive the member of his vested rights.

Smythe v. Supreme Lodge K. P. (D. C.) 198 Fed. 967; *Bornstein v. District Grand Lodge No. 4, Independent Order of B'nai B'rith*, 2 Cal. App. 624, 84 Pac. 271; *Iowa State Traveling Men's Ass'n v. Ruge*, 242 Fed. 762, 155 O. C. A. 350; *Guthrie v. Supreme Tent Knights of the Maccabees of the World*, 4 Cal. App. 184, 87 Pac. 405; *Schack v. Supreme Lodge of the Fraternal Brotherhood*, 90 Pac. 989, 9 Cal. App. 584; *Wasson v. American Patriots*, 148 Iowa, 142, 126 N. W. 778; *Zimmerman v. Supreme Tent Knights of the Maccabees of the World*, 122 Mo. App. 591, 99 S. W. 817; *Young v. Railway Mail Ass'n*, 106 S. W. 557, 126 Mo. App. 825; *Small v. Court of Honor*, 136 Mo. App. 434, 117 S. W. 116; *Umbarger v. Supreme Council of the Royal League* (Mo. App.) 118 S. W. 1199; *Coghlan v. Supreme Conclave Improved Order Heptasophs*, 86 N. J. Law, 41, 91 Atl. 132; *Evans v. Southern Tier Masonic Relief Ass'n*, 75 N. E. 317, 182 N. Y. 453, reversing 94 App. Div. 541, 88 N. Y. Supp. 162; *McCloskey v. Supreme Council A. L. H.*, 109 App. Div. 309, 96 N. Y. Supp. 347; *Mock v. Supreme Council of Royal Arcanum*, 106 N. Y. Supp. 155, 121 App. Div. 474; *Wright v. Knights of Maccabees of the World*, 106 N. Y. Supp. 1150, 122 App. Div. 904; *Dowdall v. Supreme Council, C. M. B. A.*, 108 N. Y. Supp. 1130, 123 App. Div. 913; *Feldblum v. Congregation Bikur Cholim*, 131 App. Div. 854, 116 N. Y. Supp. 289; *Stewart v. Thorburn*, 157 N. Y. Supp. 242, 171 App. Div. 258.

The converse is, of course, true; that is to say, a member will be bound by amendments or new laws which do not impair his vested rights.

Fraternal Union of America v. Zeigler, 39 South. 751, 145 Ala. 287; *Kane v. Knights of Columbus*, 84 Conn. 96, 79 Atl. 63; *Mathieu v. Mathieu*, 112 Md. 625, 77 Atl. 112.

717 (n). But before an amendment or new by-law will be declared invalid on the ground that it impairs the vested rights of the member, that fact must be clearly shown (*Gaines v. Supreme Council of Royal Arcanum* [C. C.] 140 Fed. 978). The courts will not construe a by-law no matter how positive in its terms, as intended to interfere with existing contracts or with vested rights, unless the

intention that it shall so operate is expressly declared or is necessarily to be implied from its words (*Nowak v. Murray*, 127 Ill. App. 125).

The real issue is whether a particular by-law impairs the obligation of a contract or the vested rights of the member. There is no unanimity of opinion among the courts as to what by-laws are or are not open to the objection, and no general rules other than those already indicated on pages 713 and 714 can be deduced. Reference can be made in a general way only to the decisions dealing with this phase of the question.

A new law providing that all claims must be submitted to a tribunal established within the association is not invalid as impairing a vested right. *Monger v. New Era Ass'n*, 121 N. W. 823, 156 Mich. 645, 24 L. R. A. [N. S.] 1027. By-laws changing the method of designating beneficiaries do not impair any vested rights. *Dietrich v. Modern Woodmen of America*, 161 Mo. App. 97, 142 S. W. 460; *Mathieu v. Mathieu*, 77 Atl. 112, 112 Md. 625.

The holder of a certificate conditioned by the laws of the order then or thereafter in force was bound by a change making certain persons beneficiaries when no beneficiary was named when the original beneficiary predeceased the insured, as it took away no right, but merely prevented lapse in case of member's neglect (*Dean v. Dean*, 162 Wis. 303, 156 N. W. 135).

On the other hand, a subsequent by-law, which provided that the association should not be liable for accidental injury of which there are no external marks of violence upon the body, was invalid as an additional restriction impairing vested rights. *Young v. Railway Mail Ass'n*, 103 S. W. 557, 126 Mo. App. 325. So, too, a by-law providing that, if any member shall become intemperate in the use of drugs, his certificate shall become void, cannot apply to a member who had become intemperate before the enactment of such law. *Taylor v. Modern Woodmen of America*, 83 Pac. 1099, 72 Kan. 443, 5 L. R. A. (N. S.) 283. Where the by-laws of a mutual benefit association established a single death fund created by a flat rate of dues, irrespective of age, from which a single sum was payable to all beneficiaries alike, an amendment apportioning the fund in two parts among the whole membership in proportion to the time of membership, each part to be held in trust for the members of that fund, violated the contract rights of those becoming members before the amendment. *Park v. Supreme Circle, Brotherhood of America*, 86 Atl. 432, 81 N. J. Eq. 330. A by-law limiting the time for bringing an action on a beneficiary certificate is invalid as to certificates issued before it was enacted. *Attorney General v. Supreme Council*, A. L. H., 196 Mass. 151, 81 N. E. 966; *Butler v. Supreme Council*, A. L. H., 93 N. Y.

Supp. 1012, 105 App. Div. 164. But see *McCloskey v. Supreme Council*, A. L. H., 96 N. Y. Supp. 347, 109 App. Div. 309.

In the following cases it was held that under the circumstances and in view of the provisions of the contract, amendments increasing the rate of assessment impaired the vested rights of the member. *Smythe v. Supreme Lodge K. P.* (D. C.) 198 Fed. 967; *Fort v. Iowa Legion of Honor*, 146 Iowa, 183, 123 N. W. 224; *Wright v. Knights of the Maccabees*, 196 N. Y. 391, 89 N. E. 1078, 31 L. R. A. (N. S.) 423, 134 Am. St. Rep. 838, reversing 128 App. Div. 883, 112 N. Y. Supp. 1150, rehearing denied 91 N. E. 1122, 197 N. Y. 613; *Wright v. Knights of Maccabees of the World*, 95 N. Y. Supp. 996, 48 Misc. Rep. 558; *Dowdall v. Supreme Council of Catholic Mut. Ben. Ass'n*, 89 N. E. 1075, 196 N. Y. 405, 31 L. R. A. (N. S.) 417, reversing 123 App. Div. 913, 108 N. Y. Supp. 1130. On the other hand, in the following cases amendments to the laws increasing the rate of assessment were under the circumstances of the case held not to impair any vested right. *Gaines v. Supreme Council of Royal Arcanum* (C. C.) 140 Fed. 978; *Reynolds v. Supreme Council Royal Arcanum*, 192 Mass. 150, 78 N. E. 129, 7 L. R. A. (N. S.) 1154, 7 Ann. Cas. 776; *Williams v. Supreme Council of Catholic Mut. Ben. Ass'n*, 115 N. W. 1060, 152 Mich. 1; *Trisler v. Mutual Reserve Fund Life Ass'n*, 106 S. W. 1082, 128 Mo. App. 497; *Green v. Supreme Council of Royal Arcanum*, 129 N. Y. Supp. 791, 144 App. Div. 761, reversing judgment 124 N. Y. Supp. 398; *Mock v. Supreme Council of Royal Arcanum*, 106 N. Y. Supp. 155, 121 App. Div. 474; *Supreme Ruling of Fraternal Mystic Circle v. Ericson* (Tex. Civ. App.) 131 S. W. 92; *Thomas v. Knights of Maccabees of the World*, 85 Wash. 665, 149 Pac. 7, L. R. A. 1916A, 750, Ann. Cas. 1917B, 804.

A by-law increasing the amount of the assessments under a reserve power to amend the by-laws must be shown to be so unreasonable as to be void before its adoption will be held to be unauthorized. *Supreme Lodge Knights of Honor v. Bieler*, 58 Ind. App. 550, 105 N. E. 244. And see *Smyth v. Supreme Lodge, K. P.*, 220 Fed. 438, 137 C. C. A. 32; *Uhl v. Life & Annuity Ass'n*, 155 Pac. 926, 97 Kan. 422; *Tusant v. Grand Lodge, A. O. U. W. (Iowa)* 163 N. W. 690.

So, too, a change in the method of levying assessments does not impair contract rights. *Breslow v. Southern Tier Masonic Relief Ass'n*, 107 App. Div. 123, 94 N. Y. Supp. 787. But where the change in the plan of assessment and the rate operated to reduce the benefit payable under the contract it was void. *Pearson v. Knight Templars' & Masons' Life Indemnity Ins. Co.*, 114 Mo. App. 283, 89 S. W. 588.

Amendments to the laws of the association the operation of which is to reduce the amount of the benefits payable under existing contracts are void as impairing vested rights. *Bornstein v. District Grand Lodge No. 4, Independent Order B'nai B'rith*, 84 Pac. 271,

2 Cal. App. 624; *Fort v. Iowa Legion of Honor*, 146 Iowa, 183, 123 N. W. 224; *Hart v. Life & Annuity Ass'n*, 86 Kan. 318, 120 Pac. 363, Ann. Cas. 1913C, 672; *Maheu v. L'Union Lafayette*, 98 Atl. 821, 115 Me. 330; *Pearson v. Knight Templars' & Masons' Life Indemnity Ins. Co.*, 89 S. W. 588, 114 Mo. App. 283; *Parker v. Sovereign Camp of Woodmen of the World* (Mo. App.) 196 S. W. 424; *Wiedynska v. Pulaski Polish Benev. Soc.*, 97 N. Y. Supp. 413, 110 App. Div. 732; *Feldblum v. Congregation Bikur Cholim of Brooklyn*, E. D., 116 N. Y. Supp. 289, 131 App. Div. 854; *Heath v. New York Safety Reserve Fund*, 125 N. Y. Supp. 852, 69 Misc. Rep. 452, judgment affirmed 129 N. Y. Supp. 1126, 145 App. Div. 904; *Stirn v. Supreme Lodge of Bohemian Slavonian Benev. Soc.*, 150 Wis. 13, 136 N. W. 164.

A reserved power to amend the by-laws of an association or a condition in the certificate binding the insured to compliance with subsequently adopted laws, rules, and regulations will authorize the adoption of a law reducing the benefit payable in case of suicide of the member while sane, but will not permit such a law as to suicide while insane. *Supreme Conclave Improved Order of Heptasophs v. Rehan*, 85 Atl. 1035, 119 Md. 92, 46 L. R. A. (N. S.) 308, Ann. Cas. 1914D, 58.

The right to enter a certain occupation is not a vested right; consequently by-laws prohibiting the members from entering occupations regarded as hazardous are not objectionable as impairing vested rights. Thus a by-law prohibiting insurance on persons engaged as switchmen in railroad yards is not open to this objection. *Norton v. Catholic Order of Foresters*, 138 Iowa, 464, 114 N. W. 893, 24 L. R. A. (N. S.) 1030; *Gienty v. Knights of Columbus*, 105 N. Y. Supp. 244, 55 Misc. Rep. 98, affirmed in 126 App. Div. 934, 110 N. Y. Supp. 1129. So, too, a new law prohibiting members from entering the business of manufacture or sale of intoxicating liquors does not impair any vested right. *Strang v. Camden Lodge, A. O. U. W.*, 64 Atl. 93, 73 N. J. Law, 500; *Barrett v. Grand Lodge A. O. U. W. of State of New York*, 117 N. Y. Supp. 125, 63 Misc. Rep. 429. But such a by-law would not apply in the case of a member who prior to the time of its enactment was engaged in such business and who remained in it thereafter. *Grand Lodge A. O. U. W. of Kansas v. Haddock*, 82 Pac. 583, 72 Kan. 35, 1 L. R. A. (N. S.) 1064; *Grand Lodge A. O. U. W. v. Oetzel*, 139 Ill. App. 4; *Ayers v. Grand Lodge A. O. U. W.*, 80 N. E. 1020, 185 N. Y. 280, affirming 109 App. Div. 919, 95 N. Y. Supp. 1112.

There is a great difference of opinion as to whether new by-laws forfeiting a certificate or limiting the liability of the association thereon, if the member commits suicide, are open to the objection that they impair vested rights. In the following cases it was held that such by-laws do not impair any vested right: *Scow v. Supreme Council of Royal League*, 79 N. E. 42, 223 Ill. 32; *Tisch v. Protected Home Circle*, 74 N. E. 188, 72 Ohio St. 233; *Plunkett*

v. Supreme Conclave, Improved Order of Heptasophs, 55 S. E. 9, 105 Va. 643. On the other hand, in the following cases it was held that such by-laws do impair the vested rights of a member and the beneficiary, and are therefore void: *Zimmermann v. Supreme Tent of Knights of the Maccabees of the World*, 99 S. W. 817, 122 Mo. App. 591; *Lewine v. Supreme Lodge Knights of Pythias of the World*, 99 S. W. 821, 122 Mo. App. 547; *Wilcox v. Court of Honor*, 134 Mo. App. 547, 114 S. W. 1155; *Smail v. Court of Honor*, 117 S. W. 116, 136 Mo. App. 434; *Umbarger v. Supreme Council of the Royal League (Mo. App.)* 118 S. W. 1199; *Kavanaugh v. Supreme Council of Royal League*, 158 Mo. App. 234, 138 S. W. 359; *Sautter v. Supreme Conclave Improved Order of Heptasophs*, 62 Atl. 529, 72 N. J. Law, 325, writ of error dismissed 65 Atl. 990, 74 N. J. Law, 608, and affirmed 76 N. J. Law, 763, 71 Atl. 232; *Fargo v. Supreme Tent Knights of Maccabees of the World*, 78 N. E. 1103, 185 N. Y. 578, affirming 96 App. Div. 491, 89 N. Y. Supp. 65; *Court of Honor v. Rausch*, 50 Ind. App. 161, 95 N. E. 1018; *Court of Honor v. Hutchens*, 43 Ind. App. 321, 82 N. E. 89. But compare *Court of Honor v. Hutchens (Ind. App.)* 79 N. E. 409.

6. PROPERTY AND INTERESTS COVERED BY POLICY OF MARINE INSURANCE

720-722. (a) Property covered in general

721 (a). A marine policy insuring "in port and at sea, * * * at all times, in all places and on all occasions, * * * upon the hull, spars, sails, materials, fittings, boats (including launches, steam or otherwise, if any), furniture, provisions, stores, * * * boilers, etc., of and in the schooner yacht *Rosemary*," against all manner of marine perils, and the furniture and boats against fire when laid up on shore, covered a naphtha launch, part of the equipment of the yacht, carried on davits when she was under way, and used as a means of communication with the shore when in port (*Dennis v. Home Ins. Co. [D. C.]* 136 Fed. 481).

722 (a). Certificates insuring freight, issued under running policies, are not invalid because the policies are upon cargo; but the policies, for the purpose of such certificates, must be read with the substitution of freight for goods and merchandise (*Tweedie Trading Co. v. Western Assur. Co. of Toronto*, 179 Fed. 103, 102 C. C. A. 397, affirming decree [*D. C.*] 168 Fed. 962).

7. PROPERTY COVERED BY POLICY—FIRE AND CASUALTY INSURANCE**729-732. (a) General rules**

730 (a). In construing the policy to determine what property is covered thereby, the courts usually apply the rule that the contract must be liberally construed in favor of the insured, to secure the indemnity which is the object of the contract.

American Ins. Co. v. Egyptian Lodge No. 802, I. O. O. F., 128 Ill. App. 161; *Shivers v. Farmers' Mut. Fire Ins. Co.*, 99 Miss. 744, 55 South. 965; *Montana Stables v. Union Assur. Society of London*, 101 Pac. 882, 53 Wash. 274.

An insurance company is not bound by a mere soliciting insurance agent's representations or statement as to the legal effect in the policy of words describing the property covered. *Murphy v. Continental Ins. Co.*, 157 N. W. 855, L. R. A. 1917B, 934.

Under policy insuring interest of conditional seller of furniture, items of furniture sold to new purchaser of it after it had been retaken under reservation of title, not expressly indorsed on contract, were not covered thereby. *Ætna Ins. Co. v. Heidelberg*, 112 Miss. 46, 72 South. 852, L. R. A. 1917B, 253, modifying judgment on suggestion of error 72 South. 470.

However, an insured, under a policy insuring horses, mules, hay, wagons, buggies, harness, and corn in a certain barn, cannot recover for damages to saddles, nor for the loss of lap robes or whips, nor for the use of a horse, nor for the loss of business and its profits (*American Ins. Co. v. Hornbarger & Harris*, 108 S. W. 213, 85 Ark. 337). So, too, a policy insuring against loss by burglary which covers money in current use in the business of the insured does not by reasonable construction include or refer to money derived by the insured from gambling transactions (*Beaird v. New Jersey Plate Glass Co.*, 157 Ill. App. 1).

732 (a). A fire policy should be construed, if practicable, so as to cover the subject-matter intended, and a false part of the description may be disregarded, if sufficient remains to identify the property (*Shivers v. Farmers' Mut. Fire Ins. Co.*, 99 Miss. 744, 55 South. 965). And to the same effect is *Curnen v. Law Union & Rock Ins. Co.*, 144 N. Y. Supp. 499, 159 App. Div. 493.

The question as to the meaning of the words "building" and "machinery" in a fire policy on a building and machinery therein was for the court (*Tubbs v. Mechanics' Ins. Co.*, 108 N. W. 324, 131 Iowa, 217).

732-737. (b) Location of property

732 (b). As a general rule, place and location are of the essence of a fire risk, especially where the property insured is not described in the policy otherwise than by location (*Wilson v. Farmers' Mut. Fire Ins. Co.*, 121 N. W. 284, 156 Mich. 545). So a policy covering "hay in stack" does not cover hay in the mow of a barn (*Murphy v. Continental Ins. Co.* [Iowa] 157 N. W. 855, L. R. A. 1917B, 934). If, however, the property is otherwise sufficiently identified, a misdescription as to location will not avoid the policy (*De Paola v. National Ins. Co.*, 38 R. I. 126, 94 Atl. 700). Thus a misdescription of the land on which crops insured against hail are growing will not of itself preclude recovery (*French v. State Farmers' Mut. Hail Ins. Co.*, 29 N. D. 426, 151 N. W. 7, L. R. A. 1915D, 766). A policy describing the building insured as situated "on the * * * turnpike, Sissonville, W. Va.," may mean property which is either "near to" or "in" Sissonville (*Fisher v. Sun Ins. Co.*, 74 W. Va. 694, 83 S. E. 729, L. R. A. 1915C, 619). The fact that through the inadvertence of the insured's brokers a policy on the contents of a building described it as situated at the northeast, instead of the northwest, corner of the intersection of certain streets, did not avoid the insurance, where there was no other building on either of the four corners (*Curnen v. Law Union & Rock Ins. Co.*, 144 N. Y. Supp. 499, 159 App. Div. 493).

Where a fire policy described the property as located on a homestead claim, evidence of the true location of the grant was admissible, though there was an error in the description. *Scottish Union & National Ins. Co. v. McKone*, 227 Fed. 813, 142 C. C. A. 337.

In *Wild Rice Lumber Co. v. Royal Ins. Co.*, 99 Minn. 190, 108 N. W. 871, where the policy contained a clause warranting the maintenance of a designated clear space about the insured premises, and the clause was held void as a warranty because not properly part of the Minnesota standard policy, it was nevertheless held that, as the statute authorized the company to print on its policy forms of description of the property insured, the so-called "space clause" may contain effective language limiting the general descriptive language of the policy.

The question whether an agent of an insurer assented to the insurance of property while in a particular building must be determined from what he said and did in the negotiations, and not from any uncommunicated intentions (*Ætna Ins. Co. v. Brannon*, 89 S. W. 1057, 99 Tex. 391, 2 L. R. A. [N. S.] 548, 13 Ann. Cas. 1020).

733 (b). In view of the general rule that location is an essential element in the description of property, it has been held that the words "contained in," as used in a fire policy insuring against loss of horses contained in a frame barn, cannot be construed to cover a horse which was kept in a pasture one-eighth of a mile from the barn for two months before the loss of the horse by being struck by lightning while in the pasture, whether the words be construed as "kept in" or not (*F. E. & J. L. Thorp v. Ætna Ins. Co.*, 72 Atl. 690, 75 N. H. 251). And, where a fire policy on horses, in accordance with St. Wis. 1913, § 1941—43, applied while contained in a described barn, recovery could not be had for their loss while away from the barn, on the theory that the parties contemplated their temporary removal for repairs to the barn (*Rosenthal v. Insurance Co. of North America*, 149 N. W. 155, 158 Wis. 550, L. R. A. 1915B, 361, Ann. Cas. 1916E, 395).

Where live stock insurance policies did not provide that the policy was in force only while the horse was in a certain town, and insured requested a similar renewal policy, insured could assume that the policy issued did not contain a provision so limiting the company's liability. *Indiana & O. Live Stock Ins. Co. v. Keiningham* (Tex. Civ. App.) 161 S. W. 384.

In *Globe & Rutgers Fire Ins. Co. v. David Moffat Co.*, 154 Fed. 13, 83 C. C. A. 91, the facts were these: Plaintiff tanning company prepared an elaborate rider to be attached to its insurance policies, attempting to specify every species of property for which insurance was desired on plaintiff's premises, which rider referred to a plan of the premises on file in the office of plaintiff's insurance broker. The rider attached to the policy in question provided no insurance on "bark ground and unground" contained in the building marked "3" on the plan, nor on bark and liquors in the leach house and coolers marked "2" on the plan, or on bark and liquors contained in a leach house marked "16," nor on the bark sheds on the tannery premises marked "8" on the plan, but \$10,000 on "bark in piles and under sheds on the tannery premises marked 8 on the plan." It was held, that the policy should be construed to include bark in piles on that part of the tannery premises marked "8," and did not include a bark pile in a square plot on the premises not so marked, but in proximity to a bark shed. In *Bumpus v. American Cent. Ins. Co.*, 108 Me. 217, 79 Atl. 848, the policy insured plaintiff's "one-story, frame, steel roof building, situated on the north side of Bridge street and known on the map as 'Thurston's Planing and Saw Mill,'

in Livermore Falls, privileged to be occupied as a planing mill and job shop." The map referred to was "Sanborn's Map," so-called, made for the use of fire insurance companies and their agents. Plaintiff had two "one-story, frame, steel roof buildings" north of Bridge street, in one of which logs were sawed and boards and dimension lumber planed, and there was evidence that it was known at one time as "Thurston's Planing and Saw Mill." The other building was used more especially as a fitting and job shop, and contained a planer, band saw, and other machinery, and was delineated on the map with the legend, "C. H. Thurston, Saw and Planing Mill"; the former building not being on the map at all. It was held that the policy referred to the latter building, which was on the map.

A policy of insurance on a stock of sugar and molasses "deposited" in the sugar manufactory upon a sugar plantation covers sugar and molasses coming into the sugar house as a result of the manufacture of a crop which was growing when the insurance was effected, where the risk under the policy was not to attach until a date fixed at more than two months after the date of the policy (*Royal Ins. Co. v. Miller*, 26 Sup. Ct. 46, 199 U. S. 353, 50 L. Ed. 226). This decision was followed in *Amadeo v. Northern Assur. Co.*, 201 U. S. 194, 26 Sup. Ct. 507, 50 L. Ed. 722.

734 (b). Very often the question turns on the fact that the property is described as contained in a designated building. The construction in such case depends very largely on phraseology used. Thus a policy on "dwelling and addition" and "contents of dwelling" does not cover contents of the addition (*Tate v. Jasper County Farmers' Mut. Ins. Co.*, 113 S. W. 659, 133 Mo. App. 584). A policy on grain and seeds contained in defendant's elevator and in cars on side tracks within 100 feet of it did not cover cars not within 100 feet of the elevator, though standing on a track which ran through the elevator (*J. Sidney Smith & Son v. Phoenix Ins. Co.*, 168 S. W. 831, 181 Mo. App. 455). But a policy, which describes the property insured as "lumber, laths, shingles and posts contained in their yard," covers lumber contained in a shed located in such yard (*American Ins. Co. v. Meyers*, 118 Ill. App. 484). So under the terms of a policy on a farm implement business and goods in the yard, goods on a vacant lot diagonally across from insured's building were included in the policy (*German-American Ins. Co. v. Messenger*, 25 Colo. App. 153, 136 Pac. 478).

Under a policy insuring property against fire while contained in a described building, it is incumbent on the insured to allege and

prove that the loss occurred while the property was in such building. *German-American Ins. Co. of New York v. Lee* (Okla.) 151 Pac. 642. And to the same effect, see *Miller v. Connecticut Fire Ins. Co.* (Okla.) 151 Pac. 605.

735 (b). In many cases the difficulty has arisen from the use of an addition, annex, or adjacent building. Thus where the policy insured \$3,000 on a frame corrugated iron building and additions occupied as a quartz mill, situated in a specified mining district, and \$2,000 on an electric motor and connections, "all while contained in the above-described quartz mill building" it was held that such policy did not cover a motor of different size, kept by insured in a power house detached from the mill building, and some 1,250 feet distant therefrom, connected with it only by electric wiring used to transmit power and light to the mill building and mines (*Meriwether v. Phenix Ins. Co.*, 119 S. W. 535, 137 Mo. App. 96). On the other hand, where a policy insured \$1,000 on plaintiff's machinery, tools, etc., and all building material while contained in one story frame metal roof building, and its "additions" thereto attached, and while stacked on yard within 100 feet of the above-described mill, situated, etc., it was held that a brick boiler house located 27 feet from the mill and connected with it by steam and sawdust and shavings pipes constituted an "addition" within the terms of the policy, and that lumber and shingles piled within 100 feet of the boiler house, though not within that distance of the mill building, was covered by the policy (*Georgia Home Ins. Co. v. Mayfield Planing Mills* [Ky.] 119 S. W. 1190). And in the same case it was said that where a policy covered building material stacked in a millyard 100 feet from the mill building and its "additions," material burned while piled in an open shed within such radius was covered. A policy on "household furniture while contained in the one and one-half story frame, with shingle roof, dwelling house and additions," situated in a city, covered furniture in a frame outbuilding in rear of house; agent having had knowledge that furniture would be kept in such outbuilding (*Globe & Rutgers Fire Ins. Co. v. Hamilton* [Ind. App.] 116 N. E. 597). A policy on liquor described as situated in brick building covers liquors in adjoining wooden structure, physically attached to the brick wall of the main building and used in connection with the brick building (*Violette v. Queen Ins. Co.*, 96 Wash. 303, 165 Pac. 65).

In referring to location of property insured, the phrases in the policy, "in a ginhouse," and "in additions attached thereto," will be con-

strued against the writer of the policy. *Exchange Underwriters' Agency of Royal Exchange Assur. of London, England, v. Bates*, 195 Ala. 161, 69 South. 956.

In *Wolverine Lumber Co. v. Palatine Ins. Co.*, 139 Mich. 432, 102 N. W. 991, the facts were as follows: An insurance policy covered lumber "piled in mill building, on cars, under mill sheds and in sheds adjoining to said mill building." The "mill sheds" where lumber was piled were situated some distance from the mill. The roof of the mill itself extended out 10 or 12 feet over the tracks on either side of the mill to protect the lumber and men loading or unloading cars. It was undisputed that these projections or sheds were erected simply to cover the tracks, were open at the ends and sides, and were not intended to be used as lumber sheds. It was held that the words "mill sheds" in the policy should be construed as indicating the sheds located some distance from the mill, and not those projecting from the building, and the quoted clause of the policy should be construed as though it read, "On lumber in mill building; on lumber on cars; on lumber under mill sheds and on lumber in sheds adjoining to said mill building." To the same effect is *Wolverine Lumber Co. v. Liverpool & London & Globe Ins. Co.*, 139 Mich. 435, 102 N. W. 992. In *Bickford v. Aetna Ins. Co.*, 101 Me. 124, 63 Atl. 552, personal property consisting of hay, carriages, and sleighs was insured as contained in a "frame building and addition situated" on a certain street and occupied as a livery and sale stable. The property destroyed was contained in the building connected with a larger main building by a platform and reached by a runway, from which doors opened into each building and was erected at the same time as the building and constantly used in connection with it. There was no other structure to which the term "addition" could apply, and when the policy was issued the agent of the company understood that some of the property intended to be insured was contained in such building. It was held that the building destroyed was the addition mentioned in the policy. Where the policy excluded from the risk stock contained in a sawmill and its "additions," a planing mill was construed to be an addition to the sawmill, though there was a space of 18 inches between the buildings where they communicated directly with each other, a short ladder extending between them, and lumber was passed from the sawmill directly into the planing mill and the planing mill machinery was run by a belt extending from the main

shaft of the sawmill (*Ferguson v. Lumbermen's Ins. Co.*, 45 Wash. 209, 88 Pac. 128).

736 (b). Where a policy, indemnifying assured against loss of certain designated property, including jewelry, by burglary and theft, contained a clause left blank as to the amount, referring to property contained in any safes within the premises, assured was entitled to indemnity for finger rings stolen from a safe on the premises (*Casner v. New Amsterdam Casualty Co.*, 91 S. W. 1001, 116 Mo. App. 354). In a policy of burglary insurance indemnifying insured against burglary from premises occupied by assured and described as the fourth floor of a certain building, the word "premises" referred only to the fourth floor and not to the entire building (*Axe v. Fidelity & Casualty Co.*, 86 Atl. 1095, 239 Pa. 569, 46 L. R. A. [N. S.] 574).

It has been held that a policy, issued to a railroad company, which covered in general terms all cotton on or in depots, platforms, or grounds adjacent thereto, and in transit, but which provided that cotton in open cars was not covered, insured cotton on a stationary flat car placed on a spur track adjacent to a depot to remain there about 12 hours, though the cotton was subsequently to be transported on the car, since the "open cars" referred to meant cars of that description commonly used for transportation, as the company sought to relieve itself from the increased hazard incident to the transportation of cotton on open cars due to sparks from locomotives in actual transportation, and since the words "in transit" meant in course of passing from point to point (*Royal Ins. Co. v. Texas & G. Ry. Co.*, 53 Tex. Civ. App. 154, 115 S. W. 117). So, too, where a fire policy was issued to indemnify a railroad company on all liability as a common carrier of cotton in bales in transit in cars, or in or on depots, or platforms, on line of assured's road, the policy covered cotton which was placed on the ground, but was intended to be immediately shipped (*Bennettsville & C. R. Co. v. Glens Falls Ins. Co.*, 79 S. E. 717, 96 S. C. 44).

737 (b). The policy in *Wolverine Lumber Co. v. Phenix Ins. Co.*, 145 Mich. 558, 108 N. W. 1088, covered lumber "in mill building, on cars under mill sheds, and in sheds adjoining to said mill building." Situate some distance from the mill were sheds where lumber was piled. The roof of the mill extended about 10 or 12 feet over the track on either side of the mill to protect the lumber and men loading or unloading cars. The insurer claimed that the

mill sheds included in the policy were the sheds formed by the extension of the roof of the mill building. The insured claimed that the sheds situate some distance from the mill were also included. There was evidence supporting both theories. It was held that the jury were authorized in finding that the sheds situate some distance from the mill were included in the policy.

The sufficiency of the evidence to show a waiver of a misdescription is considered in *Deltz v. Dunham & Chemung Tp. Mut. Fire Ins. Co.*, 160 Ill. App. 180.

In an action on a policy insuring certain barns and the "contents of barn buildings," the question whether the insurer had consented that property destroyed in an uninsured barn erected after issuance of the policy should be considered as "contents of barn buildings" within the policy, is for the jury (*Wilson v. Farmers' Mut. Fire Ins. Co.*, 121 N. W. 284, 156 Mich. 545). In *Greenwich Ins. Co. v. State*, 74 Ark. 72, 84 S. W. 1025, the issue was whether the policy included lumber under roof. There was a conflict in the evidence as to whether the agent knew that the roof was over the lumber piles. In reporting on issuing the policy, the agent said that he had inspected the risk, and that the total value of the property insured was \$13,000. The evidence showed that the total value was \$12,000, of which \$6,000 was under the roof. The court charged that, if the agent inserted the description in the policy from his own knowledge of the property, while inspecting it for insurance, defendant could not take any advantage of an inaccuracy in the description, unless the insured misled the agent into making such inaccuracy, and that any inaccuracy known to the agent at the time of effecting the insurance would estop defendant from asserting it after the loss. It was held that the charge was sufficiently favorable to defendant, and the finding against it could not be disturbed.

737-739. (c) Same—Shifting location

737 (c). A by-law which provides that the removal of personal property to any farm in the county shall not invalidate the insurance if the building into which it is removed is insurable is binding (*Swett v. Antelope County Farmers' Mut. Ins. Co.*, 91 Neb. 561, 136 N. W. 347). Where insurer's agent issued a new policy locating the property in the place to which he knew it was to be removed, the policy attached as valid insurance as soon as the property was moved (*Weston v. American Ins. Co.*, 177 S. W. 792, 191 Mo. App. 282).

739-742. (d) Same—Temporary removal

739 (d). Where a policy of insurance covered a farm barn and live stock customarily kept therein against loss by fire; the live stock being described as "therein on the farm and from lightning at large," it covered a horse that was on the farm at the time the policy was executed, but was subsequently taken temporarily to another farm, in which plaintiff had no interest, and while there was destroyed by fire (*Lathers v. Mutual Fire Ins. Co. of Town of La Prairie and Adjoining Towns*, 135 Wis. 431, 116 N. W. 1, 22 L. R. A. [N. S.] 848, 15 Ann. Cas. 659). Where a policy insuring chattels does not by express or clearly implied terms restrict the insurer's liability to loss occurring on the owner's premises, the insurance follows the property so long as it is put to ordinary use. Hence in a policy insuring chattels the description of the place where the property is located is merely for identification, and the removal of the chattels for appropriate and temporary use does not affect the insurance (*E. C. Winsor & Son v. Mutual Fire & Tornado Ass'n*, 170 Iowa, 521, 153 N. W. 97).

743-747. (f) Buildings—Additions and appurtenances thereto

743 (f). Where the subject of insurance is described as a building, the entire structure, composed of several parts, is included. Hence a tornado policy insuring a frame barn building covers a silo (*Still v. Connecticut Fire Ins. Co.*, 185 Mo. App. 550, 172 S. W. 625). A tornado policy providing that it covered all the buildings of insured, except those covered with a board roof, covered a building the roof of which was in part board and in part shingle (*Kennedy v. Agricultural Ins. Co.*, 21 S. D. 145, 110 N. W. 116).

744 (f). If the policy grants the privilege to make additions, the policy to cover the same, it is obvious that an addition adjoining and connected with the main building will be covered, though the policy was issued prior to the building of the addition (*Meigs v. London Assur. Co.*, 134 Fed. 1021, 68 C. C. A. 249, affirming [C. C.] 126 Fed. 781). And where nearly two years after the construction of an addition to a building, a policy was issued describing the property covered as a "two and one story brick, gravel roof building," the policy covered the addition as a matter of law (*Prussian Nat. Ins. Co. v. Terrell*, 135 S. W. 416, 142 Ky. 732). In *Smith v. Caledonian Ins. Co.* (Mo. App.) 191 S. W. 1034, it was held that in a fire policy otherwise indicating a complete building in process of alteration, the words "permission granted to complete" referred

to completion of alterations of, and not to completion of a building in course of construction. And it was also held that the fact that the policy provides that work on additions and alterations of building shall not extend over a longer period than 15 days at one time is not inconsistent with idea that policy insured a completed building in course of alteration. Moreover, under Rev. St. 1909, §§ 7020, 7030, where plaintiff's fire policy insured for \$3,500 a building in process of alteration, including additions, etc., and material and new work, held, that material when assembled on the premises to be incorporated into building should be treated as a part of realty if burned. Policies of tornado insurance not purporting to cover subsequent constructions cover property in process of construction at the time of their issuance, but not property the construction of which was begun after their issuance (*Northwestern Fuel Co. v. Boston Ins. Co. of Boston, Mass.*, 154 N. W. 515, 131 Minn. 19).

The word "additions," used in a policy described the risk as a "frame building with additions," does not necessarily mean something attached to the building, and, where extraneous evidence showed that it was meant to include outhouses, the policy will be given the broader meaning (*Ideal Pump & Mfg. Co. v. American Central Ins. Co.*, 167 Mo. App. 566, 152 S. W. 408). The word "attached," in a policy on a building and "additions attached thereto," means "connected with" or "joined to," and hence the policy covers an extension of the main floor, by means of an excavation, partly of unoccupied higher ground, the same then being planked over and partly under another building on higher ground (*Montana Stables v. Union Assur. Society of London*, 101 Pac. 882, 53 Wash. 274). So, too, in other cases the manner of attachment has been given weight. Thus in *Guthrie Laundry Co. v. Northern Assur. Co.*, 17 Okl. 571, 87 Pac. 649, 10 Ann. Cas. 936, where the policy was on a two-story basement and brick building with metal roof, and its addition "adjoining and communicating, including foundations, occupied as a steam laundry," and it appeared that a steam pipe 2½ inches in diameter, conveying the power for the engine situated in the main building, a partially completed platform and arch between the buildings, and a sidewalk along the side, were the only connections between the main building and the boiler house, situated about four feet distant, it was nevertheless held that the policy included the boiler house.

In *Shepard v. Germania Fire Ins. Co.*, 165 Mich. 172, 130 N. W.

626, 33 L. R. A. (N. S.) 156, it appeared that the plaintiff, owning a brick store and also a wooden building, used in connection with, situated five to eight feet in the rear of, and connected by an inclosed passageway with, the store, applied to the local agent for insurance. The agent issued a policy describing the insured property as the "one-story brick building." Soon after the state agent inspected the property, conferred with the local agent, and then canceled the policy, and wrote another, in which the words of description were substantially the same, with the addition of the words, "and its additions adjoining and communicating with the foundations." It was held that, there being no other building to which the word "additions" could apply, the new policy included the wooden building.

In *Prussian Nat. Ins. Co. v. Terrell*, 142 Ky. 732, 135 S. W. 416, the evidence was regarded as sufficient to require a finding that an additional policy issued on a building as concurrent insurance covered the entire building and not an addition constructed and owned by another.

It has been held that a building detached from the main dwelling, but used as a part of it, is an "addition" within a fire policy on "dwelling and addition" (*Tate v. Jasper County Farmers' Mut. Ins. Co.*, 113 S. W. 659, 133 Mo. App. 584). But in the absence of proof that it was the intent of parties to include houses disconnected with "a two-story frame building and its addition adjoining and communicating," an insurance policy thus describing the property will not include a servant's house 150 feet distant from the two-story frame building, though occupied by servants employed in the dwelling house and connected therewith by bell (*North British & Mercantile Ins. Co. v. Tye*, 58 S. E. 110, 1 Ga. App. 380). And where the owners of a clubhouse procured from the insurer thereof a permit to make alterations and repairs, including the building on of a new kitchen in place of one of them attached to and a part of the clubhouse, and in making such repairs the old kitchen was detached and removed a distance of 100 feet, and at a time when it had not been determined whether it would be reattached was destroyed by fire, it was held that such kitchen was not covered by the policy (*Evanston Golf Club v. Home Ins. Co.*, 95 S. W. 980, 119 Mo. App. 175).

In *Arlington Co. v. Colonial Assur. Co.*, 180 N. Y. 337, 73 N. E. 34, reversing 87 App. Div. 617, 84 N. Y. Supp. 1117, the policy insured the "property known as the A. Manufacturing Company,"

as shown on a map to which reference was made. The property consisted of buildings, with the machinery and the materials contained therein; and the policy described the buildings by number as shown on the plat, with certain exceptions, and gave the privilege to make additions, alterations, and repairs, to be covered by the policy. It was held that the policy included a new building constructed on land covered by the plat, together with its contents.

But compare *Arlington Co. v. Empire City Fire Ins. Co.*, 116 App. Div. 458, 101 N. Y. Supp. 772.

744 (f). Where policy covered varnish warehouse, the word "warehouse" did not include an adjacent building used for the manufacture of varnish (*Leavitt v. National Fire Ins. Co. of Hartford, Conn.*, 88 Misc. Rep. 563, 151 N. Y. Supp. 71).

746 (f). In ascertaining the intent of the parties to a contract of insurance, the valuation of the property and the premium collected may be submitted to the jury, in addition to the intent to be drawn from the words used to describe the property insured (*North British & Mercantile Ins. Co. v. Tye*, 58 S. E. 110, 1 Ga. App. 380).

747-748. (g) Fixtures

747 (g). Where a fire policy covered a building and personal property therein, and the building stood upon leased ground, fixtures attached to the building were covered by the clause of the policy insuring personal property (*Tubbs v. Mechanics' Ins. Co.*, 108 N. W. 324, 131 Iowa, 217). An iron safe in a bank is covered by a policy insuring the bank's furniture and fixtures (*Mecca Fire Ins. Co. (Mut.) of Waco v. First State Bank of Hamlin* [Tex. Civ. App.] 135 S. W. 1083). A policy stating in the typewritten portion that it covered "awnings attached to" the building, and in the printed portion that it did not cover "awnings held in storage or for repairs," embraced awnings stored in the building, but which were attached to the building when awnings were required (*Wicks v. London & Lancashire Fire Ins. Co.* [Sup.] 111 N. Y. Supp. 63). On the other hand, a policy covering farm products, farm implements, carriages, and livestock on premises, did not cover the fixtures and utensils of a slaughterhouse which were no part of a farm (*Geraghty v. Washtenaw Mut. Fire Ins. Co.*, 108 N. W. 1102, 145 Mich. 635).

"Furniture" and "fixtures," as used in a fire insurance policy, include light fixtures and globes, ceiling fans, electric meters, mirror door, and wiring of a building. *Fire Ass'n of Philadelphia v. Powell* (Tex. Civ. App.) 188 S. W. 47.

In *E. H. Emery & Co. v. American Ins. Co.*, 177 Iowa, 4, 158 N. W. 748, it was held that in a policy on furniture and fixtures to include all other furniture and fixtures, the term "furniture and fixtures" would not include ice cream freezers and testers forming a distinctive department installed subsequent to the policy, although considered as fixtures. But in a policy on ice cream machines and carriers, the subsequent general words, "all other apparatus and merchandise herein not mentioned used in the manufacture of ice cream," not being limited to the previous specific terms, dealing with the same subject, cover ice cream freezers and testers.

748-752. (h) Manufacturers' and mercantile stock

751 (h). A policy on a stock of toilet articles, labels, machinery, bottles, and powder covers cornstarch (*Aachen & Munich Fire Ins. Co. v. Arabian Toilet Goods Co.*, 10 Ala. App. 395, 64 South. 635). Under the doctrine of *ejusdem generis*, in a policy on a "stock of fruit and vegetables * * * and all other merchandise," the words "all other merchandise" had reference to the same kind of merchandise, and did not cover ice cream (*E. H. Emery & Co. v. American Ins. Co.*, 177 Iowa, 4, 158 N. W. 748).

752-754. (i) Same—Hazardous articles

752 (i). A policy describing the insured property as a frame building "while occupied as a flour and roller mill," and the fixed and movable machinery, pipes, belting, pulleys, shafting, roller mills, and appurtenances, smut mill and appurtenances, purifiers, blowers, dusters, tools, etc., "and such other machinery not more hazardous as is usual to roller mills" will be held to include machinery used in the manufacture of meal, bran, and other feed products, where not to do so would render the policy void from its execution (*Capital Fire Ins. Co. v. Carroll*, 26 Okl. 286, 109 Pac. 535).

755. (j) Machinery—Tools

755 (j). Insurance of machinery and tools will be construed with reference to the factory or establishment of which the machinery forms a part and the use for which it is designed. Thus, in a policy insuring a laundry and machinery, the word "machinery," included the boiler, pipes, and fittings; steam being used, not only as a motive power, but for providing heat for drying purposes, etc. (*Tubbs v. Mechanics' Ins. Co.*, 108 N. W. 324, 131 Iowa, 217). The term "farming utensils" is much broader in meaning than "garden tools," and in an insurance policy, "farming utensils," in-

cludes any instrumentalities within the meaning of the word "utensils" made use of on a farm, including a stock scale or a new windmill not erected (*Murphy v. Continental Ins. Co.* [Iowa] 157 N. W. 855, L. R. A. 1917B, 934).

In *Fireman's Fund Ins. Co. v. Palatine Ins. Co.*, 150 Cal. 252, 88 Pac. 907, plaintiffs' policies on a printing plant insured certain typesetting machines, etc., in terms, and defendants' policies covered "printing presses, stereotype machinery, and other fixed and movable machinery, implements, tools, furniture, and fixtures contained in the building of the insured," which policy also provided that the insuring company should not be liable under its policy for a greater proportion of any loss than the amount thereby insured would bear to the whole insurance covering the property. It was held that defendants' policies should be construed to cover the typesetting machines, and that both plaintiffs and defendants were bound to contribute to the payment of damages caused to such machines by fire. A policy covering printing presses, etc., and such other merchandise, furniture, and "fixtures" as are usually kept and used in printing office, covers linotype machine (*Review Printing Co. v. Hartford Fire Ins. Co.*, 133 Minn. 213, 158 N. W. 39).

In *Oklahoma Fire Ins. Co. v. McKey* (Tex. Civ. App.) 152 S. W. 440, the court went so far as to hold that a policy "on merchandise consisting of clothing made and in process of making, and materials for same," embraces not only all goods, wares, and merchandise on hand but also the tools and implements of the business as conducted by insured.

755-756. (k) Household furniture—Grain and crops

756 (k). A policy on "grain" will be given a broad construction, so as to cover such products of the field as are usually understood to be included in the term. Thus, a policy on stock of "grain" in a warehouse covers "bran" (*German Fire Ins. Co. v. Walker* [Tex. Civ. App.] 146 S. W. 606). So, too, a lightning policy on grain "stacks" on a farm covers grain stacked under a shed (*Farmers' Mutual v. Reser*, 88 N. E. 349, 43 Ind. App. 634; *Id.*, 88 N. E. 353, 43 Ind. App. 738).

Whether what is known as "red top seed" is grain within the meaning of a fire insurance policy is a question of fact to be determined by the jury (*Coen v. Denver Tp. Mut. Fire Ins. Co.*, 155 Ill. App. 332).

756-757. (l) Property excluded

756 (l). A policy, describing the property insured as "stock of merchandise consisting * * * of dry goods, notions * * * and all such other goods as is usually kept for sale in a dry goods store," covers patterns and pictures constituting a part of the stock of goods, though the policy stipulates that the insurer shall not be liable for loss of patterns and pictures; the specific description controlling the general provision (*Furlong & Meloy v. North British & Mercantile Ins. Co.*, 136 Iowa, 468, 113 N. W. 1084). To the same effect is *Furlong & Meloy v. Aachen & Munich Fire Ins. Co.* (Iowa) 113 N. W. 1089.

757-760. (m) Shifting risk

758 (m). The rule as to shifting risk has been applied whenever the wording of the policy and the circumstances seemed to warrant it. Thus a policy, insuring against loss for five years to the amount of \$400 "on horses, * * * hay, grain, and produce, contained in frame barn," covers any horses contained in the barn during the life of the policy, and is not limited to horses contained in the barn at the time the contract was made (*F. E. & J. L. Thorp v. Ætna Ins. Co.*, 72 Atl. 690, 75 N. H. 251). An insurance policy upon household and kitchen furniture, which was to run for three years, includes furniture acquired subsequent to the issuance of the policy (*Delaware Ins. Co. v. Wallace* [Tex. Civ. App.] 160 S. W. 1130). So a policy issued to a grain warehouseman covers malt not then in the warehouse, but subsequently shipped thereto (*Johnson v. Stewart*, 90 Atl. 349, 243 Pa. 485).

760-761. (n) General and specific insurance

760 (n). A policy for \$2,000 on "two three-story frame buildings * * * while occupied as dwellings, * * * being \$1,000 on each building," is a specific policy of \$1,000 on each of the buildings, and not a blanket policy on both.

Grollmund v. Germania Fire Ins. Co., 82 N. J. Law, 618, 83 Atl. 1108, L. R. A. 1915B, 509; *Same v. Rochester Germania Ins. Co.*, 82 N. J. Law, 733, 83 Atl. 1113.

And in the same cases it was held that a policy for \$2,000 on a three-story frame building while occupied as a dwelling house, and situated Nos. 69 and 71 East Twelfth street, is not a specific policy on each part, but a blanket policy on both.

762-763. (p) Questions of practice

762 (p). A petition, in an action on a fire policy, must allege that the property destroyed was at the time of its destruction in the county in which the action is brought; that being a necessary allegation to show jurisdiction (*Hilburn v. Phenix Ins. Co.*, 108 S. W. 576, 129 Mo. App. 670). And where property is insured as "contained in" a certain building, the complaint must allege that at the time of the fire the property was contained in such building.

Arnold v. American Ins. Co., 84 Pac. 182, 148 Cal. 660, 25 L. R. A. (N. S.) 6; *Hilburn v. Phenix Ins. Co.*, 108 S. W. 576, 129 Mo. App. 670.

If the policy is set forth in a declaration and made a part thereof, and there is an averment in the declaration that the property was lost "while located and contained as described in said policy," the location of the property destroyed at the time of the fire is sufficiently averred (*Potomac Ins. Co. v. Atwood*, 118 Ill. App. 349). So, too, a complaint alleging that on a date specified "the said property was totally destroyed by fire; * * * that said property insured as aforesaid and described in said insurance policy consisted of household and kitchen furniture contained * * * in the five-story brick building occupied only as stores and lodgings," describing the building by street and number—sufficiently alleges the location of the property at the time of its loss (*Raulet v. Northwestern Nat. Ins. Co. of Milwaukee*, 157 Cal. 213, 107 Pac. 292).

In an action on a fire policy covering a building and machinery therein, evidence as to custom or usage among fire insurance companies as to the meaning of the words "building" and "machinery" was not admissible under the general denial, but it should have been specially pleaded (*Tubbs v. Mechanics' Ins. Co.*, 108 N. W. 324, 131 Iowa, 217).

8. INTERESTS COVERED BY POLICY—FIRE AND CASUALTY INSURANCE

763-766. (a) General rules

765 (a). In the absence of language clearly indicating a contrary intent, no property or interest other than that of the insured named will be covered. Consequently, where the policy is issued to the insured in his individual capacity, it cannot be shown that it was intended to protect his interest as administrator and the interest of an heir at law (*Stanley v. Firemen's Ins. Co.*, 34 R. I. 491, 84 Atl. 601, 42 L. R. A. [N. S.] 79). So, too, when the policy is on

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property in which the insured has only a life estate, such life estate is the only interest covered by the policy (*Glens Falls Ins. Co. v. Michael*, 167 Ind. 659, 79 N. E. 905, denying rehearing 167 Ind. 659, 74 N. E. 964).

The description in a fire insurance policy was held sufficient to advise the underwriters of the nature and extent of the insured's interest as an element of the risk in *Ensel v. Lumber Ins. Co. of New York*, 88 Ohio St. 289, 102 N. E. 955.

766-767. (b) Joint owners

766 (b). In *Nelson v. Continental Ins. Co.*, 182 Fed. 783, 105 C. C. A. 215, 31 L. R. A. (N. S.) 598, it appeared that defendant issued to plaintiff a policy on a building described as a five-story and basement brick, metal-roofed building, situated, etc., providing that the insurance should cover the building, foundation, fixtures, etc. Attached to the policy was a rider declaring that it was agreed that the insurance should also cover insured's one-half interest in the south wall of the four-story and basement brick, metal-roofed building, situated on the adjoining lot, and provided that it should be void if the interest of insured was other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple. It was held that such policy covered not only the half of the party wall which was owned by insured in fee, but that it also covered damages sustained by insured to her easement of support in the other half resulting in fire damage to that part of the wall.

**768-769. (d) Insurance of liability and of property for which liable
—Contractor's insurance**

768 (d). In *Kellner v. Fire Ass'n of Philadelphia*, 128 Wis. 233, 106 N. W. 1060, 116 Am. St. Rep. 45, it was held that a policy issued to certain carriers and insuring them and other owners as interest might appear against loss by fire "on merchandise and property of every description, loaded or unloaded in cars, their own or in their custody as warehousemen, forwarders, carriers, or otherwise, and contained in a certain freighthouse," insured all property in the custody of the transportation company and was not limited to the interest or liability of the transportation company in respect to such property. And consequently the insurance company's liability for loss was not limited to property which the carriers elected to include in their list of persons and property insured, but that an owner of goods destroyed by fire in the freighthouse could recover on

the policy though his name was not included in the list forwarded by the carriers after loss.

In *Washburn-Crosby Co. v. Home Ins. Co.*, 199 Mass. 463, 85 N. E. 592, it appeared that the policy insured the property, interest, and legal liability of the Boston & Maine Railroad in property held by insured as common carriers, or warehousemen, or under any bill of lading, including all charges, either owned, advanced, or due to other lines of railroad, or steamboats. Two prior classes of property described, consisted of merchandise and property of all kinds belonging to the insured, and for which insured might "be legally liable." It was held that the policy did not cover the interest of the owner of flour held by the railroad company as warehousemen, and for the loss of which it was not liable.

770-773. (c) Property "held in trust"

770 (c). The term "held in trust" as applied to property which is the subject of insurance should be understood in its ordinary commercial sense. In *Burke v. Continental Ins. Co.*, 184 N. Y. 77, 570, 76 N. E. 1086, reversing 100 App. Div. 108, 91 N. Y. Supp. 402, the owner of a stock of glass on hand insured it under a policy covering its own or that held by it in trust, or sold, but not delivered, for which it might be held liable, and thereafter sold and delivered the glass, agreeing that all glass manufactured by it within a specified time should be the property of the vendee as soon as manufactured, and subject to the latter's order, meanwhile to be stored in warehouses of insured leased to vendee for that purpose, the insured to assume responsibility for all loss except "loss by fire," the glass to be insured by the vendee; the vendor, however, to pay the premiums. On destruction of the property by fire, it was held, in an action on the policy by an assignee of the insured, that the entire insurable interest in the property was in the vendee, and the fact that the vendor was the custodian of the property did not show that it was held in trust within the meaning of the policy.

771 (c). In *Utica Canning Co. v. Home Ins. Co.*, 132 App. Div. 420, 116 N. Y. Supp. 934, the policy issued by defendant covered merchandise, the property of the assured, or held by them in trust or on commission, contained in their warehouse. Plaintiff sold goods to assured, but the sale was rescinded, on condition that no claim should be made against plaintiff for breach of contract, and also on condition that assured would store the goods for such reasonable time as would enable plaintiff to resell them; the only

charge to be made by assured being for cartage and freight in case of resale. It was held that assured were bailees for hire as to plaintiff's goods, and that the same were covered by the policy. Where a fire policy described the property insured as being "on stock of merchandise consisting chiefly of ladies' suits, skirts and jackets, manufactured and in the process of manufacture, and all the materials used in the manufacture of the same, their own or held by them in trust, or on commission," held, that the policy covered furs and skins not owned by the insured but held by him "on memorandum," to be sold in the name of the owner, though the insured's compensation for selling them was fixed at a certain proportion of the profits (*Sloan v. Boston Ins. Co.*, 186 Ill. App. 81).

Under a fire insurance policy on goods held "in trust," recovery could be had for the loss of matches stored with the insured as a bailee for hire (*Czerweny v. National Fire Ins. Co. of Hartford* [Sup.] 139 N. Y. Supp. 345). But a bailor of grain products, stored with a warehouseman, cannot recover under a fire insurance policy procured by the warehouseman unless he intended in taking out the policy to cover the bailor's interest (*Johnson v. Stewart*, 90 Atl. 349, 243 Pa. 485).

774-776. (g) Insurance "for account of whom it may concern"—Agents, trustees, estates, etc.

774 (g). A policy providing that it is one "attaching on the property, interest, and legal liability of the Boston & Maine Railroad" was the equivalent of a statement that it was not a policy for the benefit of whom it might concern (*Washburn-Crosby Co. v. Home Ins. Co.*, 85 N. E. 592, 199 Mass. 463).

775 (g). When an agent in possession of goods has contracted to become unconditionally liable to his principal to the extent of their value on loss by fire, and procures insurance in his own name, such insurance is for his own exclusive advantage, and does not affect his obligation to his principal on his contract (*David Bradley & Co. v. Brown*, 78 Neb. 836, 112 N. W. 331, 13 L. R. A. [N. S.] 152, 126 Am. St. Rep. 647).

776-781. (h) Loss payable to appointee—Mortgagee or lessee

778 (h). In an action by a mortgagee on a policy of insurance, it will be presumed that a mortgage clause attached to a policy was issued at the time of the execution of the mortgage, and that it was issued for the purpose of protecting the rights of the usee named

therein in the mortgaged property in case of fire (Clark v. National Union Fire Ins. Co., 159 Ill. App. 256).

9. SUBJECTS OF INSURANCE IN INDEMNITY AND GUARANTY POLICIES

782-785. (a) General principles

783 (a). A bond, indemnifying bank against dishonesty of 18 employes named in schedule attached, is, in legal effect, a separate bond as to each employe, so that bank could not recover for loss which must have been caused by one of three employes, particular dishonest employe not being determined (American Sav. Bank & Trust Co. v. National Surety Co., 157 Pac. 877, 91 Wash. 307, L. R. A. 1916F, 435). A mere recital in a surety bond given by an agent that he has been appointed agent at a certain place does not limit the scope of the bond or the liability of the surety to business done by the agent at such place (Citizens' Trust & Guaranty Co. of West Virginia v. Globe & Rutgers Fire Ins. Co., 229 Fed. 326, 143 C. C. A. 446, Ann. Cas. 1917C, 416).

Clear language must be used in a fidelity bond to render the surety liable under it for past defaults (Adams Co. v. Western Surety Co., 35 S. D. 194, 151 N. W. 890).

784 (a). A title company is not bound to insure any title which the court declares marketable, but has a right to select its risks, where its contract obliges it to insure only such titles as it shall approve (Title Guarantee & Trust Co. v. Rudershausen [Sup.] 164 N. Y. Supp. 15). A policy of title insurance specifically describing the land and covering a building being erected on the premises insures the title of only so much of the building as stood upon the land (Broadway Realty Co. v. Lawyers' Title Ins. & Trust Co., 157 N. Y. Supp. 1088, 171 App. Div. 792, reversing judgment 154 N. Y. Supp. 1024, 91 Misc. Rep. 137). The fact that a title guaranty policy tendered to a purchaser was made subject to questions of survey is wholly immaterial, where the premises as described in the contract have an actual existence in fact within the boundary lines as designated in the original survey and plat (Chicago Real Estate Board v. Mullenbach, 184 Ill. App. 437).

In an action upon casualty bond, judgment recovered against insured in an action brought by the injured person does not conclusively establish that the plaintiff in such action was an employe of the insured within the meaning of the bond. *Burke v. Maryland Casualty Co.*, 192 Mich. 173, 158 N. W. 898.

10. PARTIES TO INSURANCE CONTRACTS**785-788. (a) Parties to marine and fire insurance contracts in general**

786 (a). An insurance policy is not void because the name of insured is not properly stated therein (*Romano v. Concordia Fire Ins. Co.*, 106 N. Y. Supp. 63, 121 App. Div. 489). So the fact that insured was designated "Seaman & Martin" instead of the "Seaman-Martin Company, a corporation," does not invalidate the policy (*Lenning v. Retail Merchants' Mut. Fire Ins. Co.*, 129 Minn. 66, 151 N. W. 425). Neither is a policy void because payable to the estate of a deceased person (*Norwich Union Fire Ins. Co. v. Prude*, 40 South. 322, 145 Ala. 297, 8 Ann. Cas. 121). Courts will draw every reasonable deduction to uphold contracts of insurance, and a contract issued in the name of a dead man as the insured will not for that reason alone be held invalid; but, unless it appears to the contrary, the company will be presumed to have known that the person named was dead, and that the contract was for the benefit of the persons representing the estate, especially where the policy itself provides that, wherever therein the word "insured" occurs, it shall be held to include the legal representatives of the insured (*Queen Ins. Co. v. Peters*, 10 Ga. App. 289, 73 S. E. 536).

When there is no fraud, accident, or mistake as to the description or ownership of property to be covered by an insurance policy, and the person intended to be insured and who pays the premium is in fact the owner of the same, or has an insurable interest therein, it is immaterial that the name of the insured as designated in the policy was merely a trade-name (*Lenagh v. Commercial Union Assur. Co.*, 77 Neb. 649, 110 N. W. 740). In *Merchants' Mut. Fire Ins. Co. v. Harris*, 51 Colo. 95, 116 Pac. 143, the facts were as follows: The manager of a store, conducted for the owner as "The Exposition," applied to an agent of insurer for a policy on the contents of the store, including property therein of his own. The agent was informed of the facts, and the application was signed in the name of "The Exposition" by the manager. The company issued a policy in the name of the manager, who received and retained the policy. His attention was not called to the fact that the company had charged the policy to him personally. It was held that the policy was enforceable at the suit of the manager and the owner of the store, and the company could not invoke the doctrine of estoppel against them.

788 (a). A declaration averring that plaintiff was the owner of a building; that one G. held a mortgage on it and procured, at his own expense, from defendant insurance company a policy insuring G. \$1,000 on his mortgage interest in the building; that after destruction of the building by fire defendant settled with G. for \$750; that by reason of the legal effect of a covenant in the mortgage that the mortgagor would keep the building insured and assign the policy to the mortgagee; and that in default thereof the mortgagee might effect such insurance and have a lien upon the property for the premium paid, defendant owes plaintiff \$250—was bad on general demurrer, there being no averment of any contract relation between plaintiff and defendant, or that the insurance mentioned in the covenant had been effected (*Lawrence v. Union Ins. Co. of Philadelphia*, 80 N. J. Law, 133, 76 Atl. 1053).

790-791. (d) Effect of "loss payable" and mortgage clauses

791 (d). The contract between an insurer and the mortgagee as expressed by a mortgage clause is separate and distinct from the contract between the insurer and the owner (*Heilbrunn v. German Alliance Ins. Co.*, 135 N. Y. Supp. 769, 150 App. Div. 670, questions certified 151 App. Div. 937, 135 N. Y. Supp. 1117). A policy payable upon loss to the mortgagee as his interest might appear constituted a contract with the mortgagor and mortgagee, upon which each could maintain an action in his own name to recover to the extent of his interest (*Swaine v. Teutonia Fire Ins. Co.*, 109 N. E. 825, 222 Mass. 108). Under "standard" mortgage clause in fire policy providing that insurance shall not be invalidated as to mortgagee by any act or neglect of mortgagor, mortgagee may maintain suit in his own name, and cause of action cannot be defeated by act or neglect of mortgagor (*Fidelity-Phenix Fire Ins. Co. v. Cleveland* [Okla.] 156 Pac. 638).

792-793. (f) Parties to life and accident contracts

792 (f). A proviso in an accident insurance policy that it should not be construed or held to cover any person under the age of 18 or over the age of 60 years, being equally susceptible of the construction that it related to the date of issuing the policy and that it related to the date of the accident, will be taken to relate to the date of issuance; such contracts being construed strictly against the company and in favor of insured (*Moest v. Continental Casualty Co.*, 104 N. Y. Supp. 553, 55 Misc. Rep. 128, affirmed in 122 App. Div. 897, 106 N. Y. Supp. 1138). And where the policy provided

that: "This ticket does not insure any person under 18 or over 65 years old, nor any woman except against death only," such policy issued to a man over 65 years of age was void; the words "except against death only" not applying to him (*Perry v. Standard Life & Accident Ins. Co.* [Tex. Civ. App.] 125 S. W. 374).

Under a policy taken out by a father on the life of his minor son, payable to the "executors, administrators or assigns of the insured," the son was the person insured and the beneficiary, with right to custody of policy in the father (*Burke v. Prudential Ins. Co. of America*, 221 Mass. 253, 108 N. E. 1069, Ann. Cas. 1917E, 641).

Where a member of a mutual benefit society has the right to designate a beneficiary, such beneficiary is not a party to the contract.

Ogden v. Sovereign Camp, Woodmen of the World, 78 Neb. 804, 111 N. W. 797, affirmed on rehearing 78 Neb. 806, 113 N. W. 524; *Attorney General v. Supreme Council A. L. H.*, 206 Mass. 158, 92 N. E. 136. Compare *Ables v. Ackley*, 133 Mo. App. 594, 113 S. W. 698, where it is said that members of mutual benefit companies have no property right in the indemnity, but only the right to designate the beneficiary.

On the other hand, where a life policy binds the company to pay a certain designated amount on certain conditions to a specified beneficiary, it constitutes a contract directly between the company and the beneficiary (*Lanier v. Eastern Life Ins. Co.*, 54 S. E. 786, 142 N. C. 14).

In *State v. Willett*, 171 Ind. 296, 86 N. E. 68, 23 L. R. A. (N. S.) 197, the contracts of insurance, whereby an association agreed to furnish funds for the burial of its members, provided that a member should pay a sum upon every death in the membership occurring before his own, and in consideration thereof, upon his death, the association would pay a specified firm of undertakers a sum for burial goods and service for his funeral. The association's by-laws provided that the firm of undertakers, their heirs and assigns, should furnish all burial supplies and services, and that the association should pay them the full amount of the benefits accruing under the contracts, and no part to the members' surviving relatives and friends as death benefits. It was held that the firm of undertakers was sole beneficiary under the contract.

793-794. (g) Who is "the insured" or "the assured"

793 (g). Where a policy provided that, in consideration of the premium, the company insured the Inman Manufacturing Company against loss, etc., on the following described property, the loss, if

any, payable to the American Cereal Company, as its interest might appear, the manufacturing company and not the cereal company was the insured (*American Cereal Co. v. Western Assur. Co.* [C. C.] 148 Fed. 77).

794 (g). In life insurance the word "assured" is sometimes applied to the beneficiary, but generally speaking it is synonymous with the word "insured"; but, when a third party procures a policy on another's life, such third person is spoken of as the "assured" (*Chandler v. Traub*, 49 South. 240, 159 Ala. 519).

The word "assured" is sometimes used to designate the party procuring the insurance, the word "insured" to designate the person whose life is covered; but ordinarily the words are synonymous. *Thompson v. Northwestern Mut. Life Ins. Co.*, 161 Iowa, 446, 143 N. W. 518.

794-795. (h) Parties to guaranty and indemnity policies

795 (h). Where an indemnity policy on its face undertook to insure plaintiff for the benefit of the employés whose names were attached, the insurance did not inure to the benefit of an employé whose name was not included on the schedule of names attached when the policy was written (*United Zinc Cos. v. General Acc. Assur. Corp.*, 102 S. W. 605, 125 Mo. App. 41). Where an indemnity contract insured "N. M. & Co., a copartnership, et al. (see schedule)," and the schedule named plaintiff as one of the insured, the contract made plaintiff one of the contracting parties (*Fairbanks Canning Co. v. London Guaranty & Accident Co.*, 154 Mo. App. 327, 133 S. W. 664). In *McCarl v. Travelers' Ins. Co.*, 151 Iowa, 669, 132 N. W. 12, the policy was issued to indemnify one having the legal title to a building from liability incurred for damages for injuries received in an accident in an elevator. Insured, while the record owner, did not have the beneficial interest. It was held that, as he was the only person named in the policy, he alone could claim benefits under it, and that the beneficial owners were not entitled to protection. A policy of employer's liability insurance payable to "R. & Co." will support suit by such company, which owned all stock in the "P. G. Co.," and had agreed to satisfy any judgment obtained by an injured employé against such company, and it paid the judgment, where pinned to the face of the policy was a rider providing that "notice is accepted that the gin plants named are owned and operated by 'W. C. R. & Co.,' being named and designated as the 'P. G. Co.'" (*Maryland Casualty Co. v. W. C. Robertson & Co.* [Tex. Civ. App.] 194 S. W. 1140).

795 (h). Under a policy of employers' liability insurance the employé is not a party to the contract, nor is it for his benefit.

Fidelity & Casualty Co. v. Martin, 163 Ky. 12, 173 S. W. 307, L. R. A. 1917F, 924; *Scheurman v. Mathison*, 74 Or. 40, 144 Pac. 1177.

Consequently merely obtaining a judgment against the insured for personal injuries, without payment thereof by insured, does not give the employé a cause of action against the insurer (*Connolly v. Bloster*, 72 N. E. 981, 187 Mass. 266). And it has been held in Iowa that the statute (Code, § 4087) authorizing a judgment creditor to institute equitable proceedings to subject any rights and credits belonging to the debtor to the satisfaction of the judgment, in which action persons indebted to the debtor may be made defendants, does not give an employé who has recovered a judgment against his employer a right, over against an indemnity company which is liable to the employer on his payment of the judgment, where the employer has not satisfied the same (*Cushman v. Carbondale Fuel Co.*, 98 N. W. 509, 122 Iowa, 656). On the other hand, it has been held in New Jersey that, where an insurance company contracted to indemnify against loss from liability for damages on account of personal injuries to employés caused by the negligence of the assured, an injured employé, who has recovered judgment against the assured, may sue the insurer in equity, as principal debtor, to compel payment of the full amount of the judgment, notwithstanding the insolvency of the assured (*Beacon Lamp Co. v. Travellers' Ins. Co.*, 47 Atl. 579, 61 N. J. Eq. 59).

11. BENEFICIARIES

796-798. (a) Who may be beneficiaries in general

796 (a). The term "beneficiary," as used in insurance, means such person as should stand in the capacity of the beneficiary according to the established course of the insurance business of the company with its policy holders when the policy becomes payable (*Metropolitan Life Ins. Co. v. Hooppel*, 76 N. J. Eq. 94, 74 Atl. 467).

797 (a). Unless the statute or the constitution and laws of a fraternal benefit association place a limitation upon those who may be beneficiaries under its policies, or the policy itself contains some limitation as to the beneficiaries, insured may designate as beneficiary whomsoever he pleases.

Grand Lodge Knights of Pythias v. Barnard, 9 Ga. App. 71, 70 S. E. 678; *Sinclair v. Fitzpatrick*, 138 N. Y. Supp. 272, 78 Misc. Rep.

60; *Pollock v. Household of Ruth*, 63 S. E. 940, 150 N. C. 211; *Supreme Council Catholic Knights of America v. Fitzpatrick*, 28 R. I. 486, 68 Atl. 367, 125 Am. St. Rep. 752. A subordinate lodge may be a lawful beneficiary where there is no law forbidding it. *Supreme Lodge K. P. v. Reyman*, 126 Ill. App. 482.

So where deceased applied for insurance in a mutual benefit association and paid his obligations, his contract, permitting him to select as a beneficiary any friend, in the absence of statute, the beneficiary named was eligible, although not sustaining any blood relationship (*Vawter v. Purdy*, 157 Pac. 556, 29 Cal. App. 623). On the other hand, no one can be a beneficiary except one of those in the classes designated by statute and by the laws of a beneficial society (*Supreme Lodge, New England Order of Protection, v. Sylvester*, 116 Me. 1, 99 Atl. 655, L. R. A. 1917C, 925).

No principle of public policy is violated by the designation of a stranger as beneficiary of a membership certificate in a fraternal beneficiary society, though such member has a wife or other relatives (*Stake v. Stake*, 81 N. E. 1146, 228 Ill. 630). Consequently under the charter and constitution of a mutual benefit order, providing that a benefit shall be paid on the death of each member "to his family or be disposed of as he may direct," and providing for the issuance of certificates payable to beneficiaries as directed therein, a member may nominate a beneficiary either in his family or outside of it (*Supreme Council Catholic Knights of America v. Fitzpatrick*, 28 R. I. 486, 68 Atl. 367, 125 Am. St. Rep. 752). And, moreover, the legislative intention that fraternal insurance shall not be made the subject of speculation by strangers on the life of insured is not violated by making a certificate payable to a stranger as guardian of certain named grandchildren of insured (*Mee v. Fay*, 76 N. E. 229, 190 Mass. 40).

A declaration that the object of the association is to provide relief for the "widows and orphans," or for the "family" of the deceased member, is not a restriction on the member's right to designate a beneficiary (*Pleasants v. Locomotive Engineers' Mut. Life & Acc. Ins. Ass'n*, 70 W. Va. 389, 73 S. E. 976, Ann. Cas. 1913E, 490). The designation of a brother as beneficiary is within the power of the society issuing such certificate, where the policy and by-laws declare that the fund shall be paid "to the husband, wife, orphans, families, or other dependents" as the member may direct, and where the beneficiary had taken special charge of the insured

prior to his marriage, providing for his material wants, etc. (*National Union v. Keefe*, 172 Ill. App. 101).

The date when insured in a fraternal certificate designated a new beneficiary with consent of local branch of order, would control in determining eligibility of beneficiary and not a later date when ministerial act of issuing new certificate was performed (*International Order of Twelve Knights and Daughters of Tabor v. Reynolds* [Tex. Civ. App.] 195 S. W. 330).

798-800. (b) Statutory provisions restricting the right to designate beneficiary

798 (b). Statutes restricting the right to designate a beneficiary are generally held to be prospective in their operation and not retroactive, and cannot affect certificates or policies issued prior to their passage.

Emmons v. Supreme Conclave Improved Order of Heptasophs, 6 Penne-will (Del.) 115, 63 Atl. 871; *Brown v. Grand Fountain of United Order of True Reformers*, 28 App. D. C. 200; *Hess' Adm'r v. Segen-felter*, 105 S. W. 476, 127 Ky. 348, 14 L. R. A. (N. S.) 1172.

The Pennsylvania Act April 6, 1893 (P. L. 7), limiting beneficiaries to the family, heirs, blood relatives, etc., does not prohibit a contract whereby, with consent of the association, a person not a relative pays the dues on consideration of being made beneficiary (*Shumega v. First Catholic Slovak Union*, 61 Pa. Super. Ct. 126). A fraternal beneficiary society, organized under a statute defining the persons who may be named as beneficiaries, may not give the right to name other persons beneficiaries, but it may limit the beneficiaries enumerated in the statute (*National Union v. Keefe*, 105 N. E. 319, 263 Ill. 453, Ann. Cas. 1915C, 271, reversing judgment 172 Ill. App. 101). Under the Texas statute (Rev. St. 1911, art. 4832) regulating fraternal beneficiary associations, and the rules of the Endowment of Colored Knights of Pythias of Texas, an aged, infirm, and childless member, separated from his wife, and dependent on one not a relative for support, may designate the person supporting him as beneficiary (*Jones v. Holmes* [Tex. Civ. App.] 195 S. W. 306). Rev. St. Mo. 1889, § 2823, authorizing a fraternal benefit insurance company to provide for the relief and aid of its members and their families, widows, orphans, or other kindred dependents of deceased members, forbids the designation of a stranger not related by blood or marriage, nor dependent upon a member, as a beneficiary under the certificate. And since it is

against the policy of the law to permit the funds of a fraternal association to be diverted to others than the beneficiaries contemplated by statute, an insured may not indirectly as by will designate one not qualified as a beneficiary under the certificate (*Gibbs v. Knights of Pythias*, 173 Mo. App. 34, 156 S. W. 11).

799 (b). The eligibility of a person designated to be beneficiary will be determined generally by the law of the state in which the association is incorporated.

Mund v. Rehaume, 51 Colo. 129, 117 Pac. 159, Ann. Cas. 1913A, 1243; *Bush v. Modern Woodmen of America* (Iowa) 162 N. W. 59; *Mikesell v. Mikesell*, 40 Pa. Super. Ct. 392; *Gregory v. Sovereign Camp of Woodmen of the World*, 104 S. C. 471, 89 S. E. 391; *Burns v. Burns*, 95 N. Y. Supp. 797, 109 App. Div. 98, affirmed 82 N. E. 1107, 190 N. Y. 211. (But the certificate in this case also contained an agreement that the contract should be governed by the law of the state where the association had its home office, namely, Ohio.)

On the other hand, in some jurisdictions it is the rule that, where a beneficial society depends for its power to do business on the statutes of two states, one where it is organized, and the other wherein it is permitted to do business as a foreign corporation, the statute of the latter state controls as to who may be beneficiaries in cases originating in such latter state.

Dolan v. Supreme Council of Catholic Mut. Ben. Ass'n, 116 N. W. 383, 152 Mich. 266, 16 L. R. A. (N. S.) 555, 15 Ann. Cas. 232, overruling on rehearing 113 N. W. 10, 13 L. R. A. (N. S.) 424; *Loyd v. Modern Woodmen of America*, 87 S. W. 530, 113 Mo. App. 19; *Pauley v. Modern Woodmen of America*, 87 S. W. 990, 113 Mo. App. 473; *Dennis v. Modern Brotherhood of America*, 119 Mo. App. 210, 95 S. W. 967; *Haven v. Home Ins. Co.*, 149 Mo. App. 291, 130 S. W. 73; *Umberger v. Modern Brotherhood of America*, 144 S. W. 898, 162 Mo. App. 141.

Rev. St. Neb. 1913, § 3298, prescribing beneficiaries of fraternal beneficiary associations, governs in all Nebraska contracts, and law of domicile of foreign association has no application thereto. *Dworak v. Supreme Lodge of Western Bohemian Fraternal Ass'n* (Neb.) 163 N. W. 471.

Under the Missouri statute (Rev. St. 1909, § 7109), defining the beneficiaries in benefit certificates, and in view of Rev. St. 1909, §§ 1671-1678, a foreign fraternal beneficiary society was entitled to the benefit of the laws of this state, as there was no substantial difference between classes of beneficiaries recognized by its charter and

classes mentioned by statute (*Tuite v. Supreme Forest Woodmen Circle*, 187 S. W. 137, 193 Mo. App. 619).

If beneficiary of fraternal benefit certificate was eligible under statute at time he was designated, but not under statute in force at time of member's death he may not be deprived of rights acquired by him under certificate, where laws of association did not require that beneficiary belong to one of statutory classes at death of member (*International Order of Twelve Knights and Daughters of Tabor v. Reynolds*, 195 S. W. 330).

800-801. (c) Provisions of by-laws

800 (c). If the statute contains provisions limiting to certain classes the persons who may be beneficiaries, the by-laws of the association must, in general, conform thereto.

Farrenkoph v. Holm, 237 Ill. 94, 86 N. E. 702; *Dennis v. Modern Brotherhood of America*, 119 Mo. App. 210, 95 S. W. 967.

That is to say, the by-laws cannot be broader than the statute. It is, however, competent for the association to restrict the object of its benevolence to fewer than the classes authorized by the statute.

Murphy v. Nowak, 79 N. E. 112, 223 Ill. 301, 7 L. R. A. (N. S.) 393; *Cerny v. Jednota Cesky Dam*, 146 Ill. App. 518; *Same v. Sesterska Podporujici Jednota*, 146 Ill. App. 590; *Royal League v. Shields*, 159 Ill. App. 54; *Szczukowski v. Polska*, 172 Ill. App. 192; *Rizzo v. Catholic Order of Foresters*, 176 Ill. App. 165; *Dunbar v. Royal League*, 184 Ill. App. 1; *National Union v. Keefe*, 105 N. E. 319, 263 Ill. 453, reversing judgment 172 Ill. App. 101; *Grand Lodge A. O. U. W. of Maine v. Conner*, 116 Me. 224, 100 Atl. 1022; *State ex rel. Kane v. Knights of Father Mathew*, 144 S. W. 896, 164 Mo. App. 361; *Pettus v. Hendricks*, 113 Va. 326, 74 S. E. 191. But compare *Farrenkoph v. Holm*, 237 Ill. 94, 86 N. E. 702. See, also, *Armstrong v. Modern Brotherhood of America*, 245 Mo. 153, 149 S. W. 459, holding that a fraternal benefit association is not deprived of its character as such by a provision of its by-laws authorizing the payment of benefits to a class not covered by Rev. St. 1909, § 7109.

In *Thayer v. Thompson*, 220 Pa. 241, 69 Atl. 758, the charter of a beneficial association provided that, on the death of the member, the benefits should be payable to his widow or orphans and such of them or such other person as the member might have designated. It was held that the member could designate a friend, though the by-laws of the association provided that, when the mem-

ber had no living relative, a friend might be named, the by-law being permissive, but, if prohibitive, void as contravening the charter.

801-803. (d) Same—Effect of subsequent by-laws

801 (d). The right to designate certain persons as beneficiaries is a vested one, so as to render invalid subsequent by-laws restricting such right so far as future designations are concerned.

Dieterich v. Modern Woodmen of America, 161 Mo. App. 97, 142 S. W. 400; *Mathieu v. Mathieu*, 112 Md. 625, 77 Atl. 112.

802 (d). Nevertheless an amendment to the by-laws restricting the right to designate beneficiaries will not operate retroactively, so as to affect designations already made under existing contracts.

Kaemmerer v. Kaemmerer, 231 Ill. 154, 83 N. E. 133; *Cigar Makers' International Union of America v. Huecker*, 123 Ill. App. 336; *Dolan v. Supreme Council of Catholic Mut. Ben. Ass'n*, 116 N. W. 383, 152 Mich. 266, 16 L. R. A. (N. S.) 555, 15 Ann. Cas. 232, overruling on rehearing 113 N. W. 10, 13 L. R. A. (N. S.) 424; *Sinclair v. Fitzpatrick*, 138 N. Y. Supp. 272, 78 Misc. Rep. 60. But see *Supreme Council of Royal Arcanum v. McKnight*, 238 Ill. 349, 87 N. E. 299, reversing 140 Ill. App. 421.

Under a beneficial association's revised code provision repealing all inconsistent provisions, a section carried forward giving members an unrestricted right to change beneficiaries repeals a section not carried forward prohibiting a member whose certificate is payable to his wife or dependent children from changing beneficiaries, except as between the wife and children. *Supreme Tent, Knights of the Maccabees of the World v. Altmann*, 134 Mo. App. 363, 114 S. W. 1107.

When a benefit certificate named one as beneficiary as the wife of the insured, whereas she was affianced but not married to him, and ineligible as beneficiary under the laws of the insurer, and after her marriage to the insured, a change in the laws rendered affianced wives eligible, the beneficiary was entitled to recover (*Burr v. Royal League*, 193 Ill. App. 238).

803-805. (e) Construction and effect of limitations

803 (e). The constitution and rules of a fraternal order, which designates the beneficiaries under its certificates, should be liberally construed according to the ordinary and common use of words.

Mund v. Rehaume, 51 Colo. 120, 117 Pac. 159, Ann. Cas. 1913A, 1243; *Journeyman Butchers' Protective & Benevolent Ass'n v. Bristol*, 17 Cal. App. 576, 120 Pac. 787; *Shelton v. Minnis*, 107 Miss. 133, 65 South. 114.

The right of a member of a beneficial association to designate a beneficiary is of course limited to the class to whom the association may lawfully contract to pay benefits (*Ryan v. Firemen's Mut. Benev. Ass'n No. 1, Jersey City*, 77 N. J. Law, 399, 72 Atl. 53). Consequently the beneficiary designated by the member of a mutual benefit association must be within the classes permitted by the statute and charter or by-laws of the association, and the designation as beneficiary of a person not within those classes is nugatory.

Journeyman Butchers' Protective & Benevolent Ass'n v. Bristol, 17 Cal. App. 576, 120 Pac. 787; *Fraternal Tribunes v. Teutsch*, 170 Ill. App. 47; *Farra v. Braman* (Ind. App.) 82 N. E. 926, rehearing denied 84 N. E. 155; *Pilcher v. Puckett*, 77 Kan. 284, 94 Pac. 132, 17 L. R. A. (N. S.) 1083; *Sturges v. Sturges*, 102 S. W. 884, 126 Ky. 80, 31 Ky. Law Rep. 537, 12 L. R. A. (N. S.) 1014; *Meinhardt v. Meinhardt*, 117 Md. 426, 83 Atl. 715; *Meyer v. Grand Lodge of Order of Sons of Herman of Minnesota*, 121 N. W. 235, 108 Minn. 25, 133 Am. St. Rep. 460; *Dennis v. Modern Brotherhood of America*, 95 S. W. 967, 119 Mo. App. 210; *Umberger v. Modern Brotherhood of America*, 144 S. W. 898, 162 Mo. App. 141; *Jones v. Mangan*, 151 Wis. 215, 138 N. W. 618, Ann. Cas. 1914B, 59.

805-806. (f) Particular limitations or classes of beneficiaries

805 (f). The statute may so limit the classes who may be beneficiaries as to render ineligible a stranger to the blood of the insured (*Royal League v. Shields*, 159 Ill. App. 54). Where the constitution of an association provides that the member's mother could be his beneficiary, a designation of a stepmother as the beneficiary was valid, where he was single and was living with her as a member of the same family at the time of his death (*Jones v. Mangan*, 151 Wis. 215, 138 N. W. 618, Ann. Cas. 1914B, 59).

Where the membership of a beneficial association was limited to employes of three departments of a city, it was within the exemption of Act April 6, 1893, § 4 (P. L. 9), providing that a voluntary association confined to members and employes of firms or corporations shall be exempt from such act, and a member of such association may name as beneficiary a person other than a member of his family, his heir, affianced husband, or affianced wife, or person dependent upon him (*Thayer v. Thompson*, 69 Atl. 758, 220 Pa. 241).

In *Oliphant v. American Health & Accident Ass'n*, 147 Iowa, 656, 126 N. W. 806, the facts were these: The Iowa statute (Code, § 1789) provides that no stipulated premium and assessment life insurance associations shall issue a certificate of membership unless the beneficiary belongs to one of certain classes named, and that

any certificate issued in violation of the section shall be void. A certificate was issued providing that, if insured should receive certain injuries resulting in death, the association would pay to a specified church a certain sum, and that, if insured should receive such injuries causing disabilities not resulting in death, insured should be paid a stated weekly stipend. It was held that, though the church was not a person to whom a benefit could be made payable, the certificate was not wholly void, since the provision for payments to insured in case of accident not resulting in death was valid and the statute does not provide that, if under independent provisions for different beneficiaries one of the beneficiaries named is within a prohibited class, the certificate shall be void as to other beneficiaries for whom provisions may properly be made.

The Wisconsin statute (Rev. St. 1898, § 1955c, as amended by Laws 1899, p. 138, c. 101) authorizing members of a fraternal beneficiary corporation to name as beneficiary any person or persons designated by the laws of such corporation, or, if the laws thereof permit, providing that the insurance may be made payable to the member's estate, is a limitation on the rights of members; and where the laws of a corporation permitted only "survivors" of the member to be named as beneficiaries, one who was not a relative of a member was not a "survivor," and was not entitled to recover on the certificate, though designated by the member as his beneficiary in the manner provided by the laws of the corporation (*Grand Lodge of Wisconsin of Order of Hermann's Sons v. Lemke*, 102 N. W. 911, 124 Wis. 483).

A member of a fraternal benefit association who has authority only to appoint, as beneficiaries, his wife, children, relatives, or dependents may not appoint his creditors (*O'Brien v. Massachusetts Catholic Order of Foresters*, 220 Mass. 79, 107 N. E. 400). The term "devisee," in the Incorporation Act, is capable of including anybody, so long as he or she is designated in the benefit certificate of a fraternal beneficial society, if the charter is broad enough to include such person, and where sufficiently broad an affianced wife of a member is eligible as a beneficiary (*Dunbar v. Royal League*, 184 Ill. App. 1).

806 (f). Where the constitution and by-laws of a mutual benefit association provided that certificates might be made payable only to the family or wife of a member, or a person dependent on him, a beneficiary to whom the proceeds were made payable as wife of the member, and who had lived with him as his wife and been sup-

ported by him, was entitled to the proceeds, though in fact there had been no lawful marriage between herself and the member (*Richards v. King*, 107 N. Y. S. 720, 57 Misc. Rep. 177). And in *Grand Lodge Knights of Pythias v. Barnard*, 9 Ga. App. 71, 70 S. E. 678, it was said that, though a fraternal benefit association insures its members only in behalf of their wives, children, or other near relative, a member may, unless expressly forbidden, procure a policy or certificate payable to one whom he expects to marry and designate her in the policy as his wife, and, if the marriage takes place before his death, the association cannot avoid the policy because the beneficiary was not at the time of its issuance one of the class of persons capable of being designated as beneficiary. On the other hand, in *Meinhardt v. Meinhardt*, 117 Md. 426, 83 Atl. 715, it was held that benefits would not be paid to one with whom the member lived illicitly for 10 years after separation from his wife, though such person was designated beneficiary as the wife of the member.

The constitution of benefit society, providing for payment to widow or dependent of member of death benefit, does not authorize payment to a widower, in full possession of his faculties, though the member, his deceased wife, helped occasionally in his business (*Tierney v. Perkins*, 178 App. Div. 391, 164 N. Y. Supp. 982). So, too, under a mutual benefit association policy designating one as beneficiary by name, followed by the words, "bearing relationship of husband," and expressly subject to the association constitution and laws, limiting beneficiaries to husband or wife or certain relatives, a divorced husband cannot take as beneficiary (*Lawson v. United Benev. Ass'n* [Tex. Civ. App.] 185 S. W. 976).

Under the Illinois statute (Hurd's Rev. St. 1905, c. 73, § 258, and Act 1893, p. 130, as amended by Act 1895, p. 178), providing that benefits may be made payable to "heirs, blood relations, affianced husband or affianced wife or to persons dependent upon members," an affianced wife may become a beneficiary though not dependent, and though the constitution and by-laws of the society limited the beneficiaries to relatives and dependent members (*Farrenkoph v. Holm*, 86 N. E. 702, 237 Ill. 94). But in *Dunbar v. Royal League*, 184 Ill. App. 1, it was held that where a fraternal benefit society is incorporated under the Incorporation Act, and its charter limits the beneficiaries of deceased members to their widows, orphans, and dependents, which is narrower than the limits of the statute, the powers must be determined from the charter. It has no power to

enact a by-law providing for benefits to an affianced wife, and an affianced wife is not eligible as a beneficiary. And if the charter declares the objects of the corporation to be to benefit the widows, orphans, and dependents of deceased members thereof and to establish a fund to pay benefits to the family or dependents of a member, an affianced wife is not a dependent. It is, of course, a general rule that the persons eligible as beneficiaries under fraternal insurance policies are to be determined by the association's rules, and restrictions on the classes of persons eligible as beneficiaries, cannot be inferred from general statements, but must be expressed in positive terms. It was held in *Christenson v. Madson*, 127 Minn. 225, 149 N. W. 288, Ann. Cas. 1916C, 584, that, where the by-laws of a fraternal association provided that policies could be made payable to an insured's affianced wife, a policy so payable was valid, though the stated object of the association was to provide insurance for surviving relatives of members. Under the South Dakota statute (Civ. Code, § 712), limiting the issuing of benefit certificates to "wife, relative, legal representative, heir or legatee," insured might designate his fiancée as beneficiary where he made her his legatee (*Christenson v. El Riad Temple, Ancient Arabic Order Nobles of Mystic Shrine of Sioux Falls*, 37 S. D. 68, 156 N. W. 581). But a married man, having a living undivorced wife, cannot, under the by-laws of a mutual benefit association, authorizing the affianced wife of the member to be designated as beneficiary, lawfully designate his certificate to a woman not his wife as his fiancée (*Mendelson v. Gausman*, 142 N. Y. Supp. 293, 157 App. Div. 370, affirming judgment 139 N. Y. Supp. 947, 78 Misc. Rep. 457).

806-808. (g) Same—Children

806 (g). It has been held in Illinois (*Martin v. Modern Woodmen of America*, 97 N. E. 693, 253 Ill. 400, affirming judgment 163 Ill. App. 548) that the term children as used in a certificate payable to the widow and "children" does not include grandchildren.

807 (g). Where a widow with one child married a widower with six children and had two children, and he took out a policy of insurance payable to his wife in trust for herself and their children, the children by the first wife were entitled to share in the proceeds of the policy (*Lehman v. Lehman*, 64 Atl. 598, 215 Pa. 344).

The sufficiency of the evidence to show that the letters "ren" were erased from the word "children" after the policy was delivered, leaving the designated beneficiary of a part of the certificate de-

scribed as "child," instead of "children," is considered in *Thompson v. Thompson*, 100 Miss. 869, 57 South. 291.

Where statute of foreign state under which an order was doing business permitted payment of death benefits only to "children," and to one whose dependency is established, a stepchild may be designated as a beneficiary, if the relation of parent and child exists (*Hummel v. Supreme Conclave Improved Order Heptasophs*, 256 Pa. 164, 100 Atl. 589). And a by-law designating an adopted child as a proper beneficiary embraced a stepdaughter belonging to the same household with the insured member (*Anderson v. Royal League*, 153 N. W. 853, 130 Minn. 416, L. R. A. 1916B, 901, Ann. Cas. 1917C, 691).

The word "children," as used in Rev. St. Tex. 1911, art. 4832, providing that death benefits in beneficial associations may be made payable to children by legal adoption, designated the relationship and not the age of the beneficiary, and to include the foster mother of the insured, whom he adopted as his legal heir (*Mellville v. Wickham* [Tex. Civ. App.] 169 S. W. 1123). Where before joining insurance order, insured had virtually adopted children, no adoption laws then existing, and when such laws were passed children were of age, the defense, in action by beneficiaries, that children could not be beneficiaries was without merit, where society had continually accepted assessments (*Clayton v. Supreme Conclave, Improved Order of Heptasophs*, 130 Md. 31, 99 Atl. 949).

808-809. (h) Same—Heirs, representatives, or next of kin

808 (h). Where a mutual benefit certificate was payable to the member's "legal heirs," the persons entitled to take should be determined by the laws of the state of the member's residence at the time of his death.

Burke v. Modern Woodmen of America, 84 Pac. 275, 2 Cal. App. 611;
Thomas v. Covert, 126 Wis. 593, 105 N. W. 922, 3 L. R. A. (N. S.) 904, 5 Ann. Cas. 456.

Where a benefit certificate was payable to the member's legal heirs, the term "legal heirs" will be construed as used in its popular sense, as designating those entitled to receive the personal property of an intestate (*Thomas v. Covert*, 105 N. W. 922, 126 Wis. 593, 3 L. R. A. [N. S.] 904, 5 Ann. Cas. 456).

Under the laws of Ohio, a widow may be the heir of her deceased husband, and is included in the word "heirs" as used in a beneficial insurance certificate payable to the "heirs" of the husband (*Burns*

v. Burns, 95 N. Y. Supp. 797, 109 App. Div. 98, affirmed 82 N. E. 1107, 190 N. Y. 211). On the other hand, in *Fraternal Tribunes v. Teutsch*, 170 Ill. App. 47, it was held that the words "legal heirs of the deceased member," as used in the statute pertaining to designation of beneficiaries, do not include the widow of the deceased member. A brother-in-law is not an heir under the law of Illinois (*Grand Lodge A. O. U. W. v. Ehlman*, 246 Ill. 555, 92 N. E. 962).

809 (h). A certificate issued by a fraternal insurance association payable to the estate of a member is payable to his "legal representative" within the by-laws of the association authorizing certificates to be made payable to legal representatives (*Vaughan's Adm'r v. Modern Brotherhood of America*, 149 S. W. 937, 149 Ky. 587). A fraternal benefit association authorized to issue certificates payable to legal representatives in trust for the member's heirs is authorized to issue a certificate to a member's legal representative (*Supreme Tribe of Ben Hur v. Gailey*, 117 Ark. 145, 173 S. W. 838). Nieces and nephews will be treated as legal representatives (*Wright v. Grand Lodge K. P., Colored* [Tex. Civ. App.] 173 S. W. 270). The words "representative" and "legal representative" of a person do not necessarily exclude the administrator or executor, but such words employed in a policy of a benefit association in view of the purposes of the association to benefit the family and heirs of deceased members were not intended to include the administrator of the member referred to in a policy (*Tucker v. Knights of Pythias of North and South America*, 135 Ga. 56, 68 S. E. 796).

809-811. (4) Same—Family

809 (i). A restriction that a beneficiary must be a member of insured's family is reasonable and valid (*Caldwell v. Grand Lodge of United Workmen*, 148 Cal. 195, 82 Pac. 781, 2 L. R. A. [N. S.] 653, 113 Am. St. Rep. 219, 7 Ann. Cas. 356). The question who may be regarded as members of the "family" has been passed upon in numerous cases. The mother of the insured with whom he was living is of course regarded as a member of his family (*Klee v. Klee*, 47 Misc. Rep. 101, 93 N. Y. Supp. 588). But in *Western Commercial Travelers' Ass'n v. Tennent*, 128 Mo. App. 541, 106 S. W. 1073, the mother of the insured since she was not living with him but with her husband, an able-bodied man, was held not to be a member of insured's family. A stepfather, who was not a member of his stepdaughter's family at the time of her death, though at a previous time he had boarded with her for a time, was not a member of her family (*Su-*

preme Lodge, Order of Mut. Protection, v. Dewey, 106 N. W. 140, 142 Mich. 666, 3 L. R. A. [N. S.] 334, 113 Am. St. Rep. 596, 7 Ann. Cas. 681). But a stepdaughter of insured is a member of insured's family and within the class of permitted beneficiaries under the Illinois statute, where they were members of the same household and he contributed to the support of the household (*Anderson v. Royal League*, 153 N. W. 853, 130 Minn. 416, L. R. A. 1916B, Ann. Cas. 1917C, 691).

Under the charter of a beneficial association, authorizing a member to designate, as the recipient of the benefit payable on his death, a person of his "immediate family," or, in default of such family, one of his blood relatives, a daughter of insured living with him as a member of the same household, with him as its head, may be designated as beneficiary, as one of his immediate family, though she be of age, so that he is not legally bound to support her and she is not under his legal control (*Dalton v. Knights of Columbus*, 67 Atl. 510, 80 Conn. 212, 125 Am. St. Rep. 116, 11 Ann. Cas. 568).

Where the member lived with friends, none of whom were dependent on him, and, while he paid no board, they expected compensation at his death the wife of the person in whose home the member lived was not a member of his family (*Supreme Commandery U. O. G. C. v. Donaghey*, 75 N. H. 197, 72 Atl. 419). In *Grand Lodge A. O. U. W. v. McKay*, 149 Mich. 90, 112 N. W. 730, the person designated as beneficiary had been taken from a foundling hospital by the member's wife, but had never been legally adopted. It was held that he was not a member of the family. But one who had taken the holder of a mutual benefit certificate into her household without charge, though not dependent on him as stated in the certificate, is a member of same family, and entitled to recover as a beneficiary under the certificate (*Peterson v. National Council of Knights and Ladies of Security*, 189 Mo. App. 662, 175 S. W. 284).

811-812. (j) Same—Relations

812 (j). In some instances the term "relative" or "related" as used in a by-law or statute providing that a beneficiary must be a relative of or related to the member has been held to include relatives by marriage. Thus, in *Tolson v. National Provident Union*, 60 Misc. Rep. 460, 113 N. Y. Supp. 534, affirmed in 130 App. Div. 884, 114 N. Y. Supp. 1149, it was held that the term included one who married a sister of the wife of the member. But a niece of the

member's father's first wife, the member being a son of a second wife, is not a relative of the member by either consanguinity or affinity (*Smith v. Supreme Tent Knights of Maccabees*, 127 Iowa, 115, 102 N. W. 830, 69 L. R. A. 174). So, too, the son of insured's wife is not a relative of his, within the by-laws of a beneficial association allowing relatives to be beneficiaries (*Morey v. Monk*, 40 South. 411, 145 Ala. 301).

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 4832, nephews and nieces may be designated as beneficiaries of fraternal insurance certificates. *Wright v. Grand Lodge K. P., Colored* (Tex. Civ. App.) 173 S. W. 270.

In some instances the law of the association in classifying those who may be beneficiaries limits the relatives to blood relatives. Such provisions are reasonable and valid (*Caldwell v. Grand Lodge of United Workmen*, 148 Cal. 195, 82 Pac. 781, 2 L. R. A. [N. S.] 653, 113 Am. St. Rep. 219, 7 Ann. Cas. 356). Under such a provision a member may of course designate as beneficiaries his brothers and sisters (*Grand Lodge, A. O. U. W. of Michigan, v. Brown*, 125 N. W. 400, 160 Mich. 437), his illegitimate daughter (*Stahl v. Grand Lodge, A. O. U. W.*, 44 Tex. Civ. App. 203, 98 S. W. 643), or a cousin (*Gray v. Sovereign Camp, Woodmen of the World*, 47 Tex. Civ. App. 609, 106 S. W. 176). But a by-law which excludes second cousins from the category of blood relatives is valid (*Flannery v. Gleason*, 133 Ill. App. 398).

A son-in-law is not a blood relative (*Supreme Lodge, New England Order of Protection, v. Hine*, 82 Conn. 315, 73 Atl. 791); neither is a brother-in-law (*Sanders v. Grand Lodge, A. O. U. W.*, 153 Ill. App. 7).

The Massachusetts statute (St. 1876-77, p. 586, c. 204) provided that associations "may for the purpose of assisting the widows, orphans, or other persons depending upon deceased members, provide, in their by-laws, for the payment by each member of a fixed sum to be held by such association until the death of a member occurs, and then to be paid to the person or persons entitled thereto." St. 1882, p. 149, c. 195, § 2, amended such statute, and declared that the fund thus authorized should be "for the purpose of assisting the widow, orphans, or other relatives of the deceased, or any persons depending on deceased members." It was held in *Mathewson v. Supreme Council Royal Arcanum*, 146 Mich. 671, 110 N. W. 69, that after the amendment a member was authorized to designate a relative as beneficiary.

812-815. (k) Same—Dependents

813 (k). A statute should be liberally construed in determining whether the beneficiary named by the insured in a fraternal beneficiary association is a "dependent" within the meaning of the statute (*Koenigstein v. Finke* [Neb.] 163 N. W. 758, L. R. A. 1917F, 398). The term "dependent," as used in the statute or laws of an association, providing that dependents may be beneficiaries, is not limited to the members of the family, relatives, or heirs of the member (*Sovereign Camp Woodmen of the World v. Noel*, 34 Okl. 596, 126 Pac. 787, 41 L. R. A. [N. S.] 648). Dependency is not confined to strict legal grounds, but may rest on moral or equitable grounds.

Fuller v. Supreme Council Royal Arcanum (Ind. App.) 115 N. E. 372;
Supreme Lodge, New England Order of Protection, v. Sylvester,
 116 Me. 1, 99 Atl. 655, L. R. A. 1917C, 925.

A child taken from an orphan asylum when 3 years old by a husband and wife, supported by them as a member of their family until 20 years old, and called and treated as their daughter, was during such time a "dependent" of the husband, and could lawfully be made the beneficiary in a certificate issued to him by a benefit order (*Murphy v. Nowak*, 79 N. E. 112, 223 Ill. 301, 7 L. R. A. [N. S.] 393). So, too, an adopted daughter may be regarded as a dependent (*Nowak v. Murray*, 127 Ill. App. 125). In *Goff v. Supreme Lodge Royal Achates*, 90 Neb. 578, 134 N. W. 239, 37 L. R. A. (N. S.) 1191, it was held that where a woman, who is without means, in good faith leaves her own home and work, and assumes and for years faithfully performs the duties of a housekeeper for the member, not related to her by consanguinity, under an agreement that in consideration for such services he will support her, and at his death leave her his estate, and no evidence is offered showing any improper relations between them, she thereby becomes a dependent upon such member, and as such is eligible as a beneficiary. And when beneficiary named performs personal services for insured under an agreement that he will contribute to her support by provision thereof in his will she is to that extent dependent upon him (*Koenigstein v. Finke* [Neb.] 163 N. W. 758, L. R. A. 1917F, 398).

In *Wilber v. Supreme Lodge of New England Order of Protection*, 192 Mass. 477, 78 N. E. 445, it appeared that the claimant and her two sisters lived together, and, prior to the marriage of one of

them to deceased, it was arranged that after the marriage the four should continue to "run the house," whereupon the wife and one sister, who was in ill health, kept the house, and claimant continued to work for wages, which she contributed to the common fund. After the death of the wife, the home was continued as before, whereupon deceased took out a benefit certificate, naming claimant as beneficiary, in order to assist her to support herself and her invalid sister after his death. It was held that claimant was "dependent" on deceased, within Rev. Laws, c. 119, § 6, limiting beneficiaries in such societies to dependents on the member. A niece of insured's deceased wife, who had been reared in his family, and who had married, and was supported by her husband is not a dependent who can be designated as beneficiary under a fraternal beneficiary insurance certificate (*Bush v. Modern Woodmen of America* [Iowa] 152 N. W. 31).

Under Laws N. Y. 1911, c. 198, amending Insurance Law, § 231, par. 2, by defining parties to whom certificates shall be payable, and by-laws of defendant council defining beneficiary to mean blood relative, wife of member's uncle not his dependent had no right of action on certificate. *Dusenbury v. General Grant Council*, No. 128, Junior Order United American Mechanics of State of New York, 161 N. Y. Supp. 103, 96 Misc. Rep. 665.

The law does not prescribe just what degree of dependence is necessary; the test being good faith, purity of purpose, material dependence, and material support (*Sovereign Camp Woodmen of the World v. Noel*, 34 Okl. 596, 126 Pac. 787, 41 L. R. A. [N. S.] 648). Dependence is a question of fact; but a liberal construction must be given to a certificate issued by a fraternal benefit association, and dependence founded on a moral duty to provide for another must be recognized, and a state of dependency may exist though no legal or moral duty rests on one to give aid to the dependent, but dependency cannot rest alone on a promise or contract, and the word "dependent" is in some sense at least used as similar to the dependence which usually obtains in the family relation (*Royal League v. Shields*, 96 N. E. 45, 251 Ill. 250, 36 L. R. A. [N. S.] 208). In this case the facts were these: A member of a fraternal benefit association surrendered his certificate payable to his nieces, and obtained a second certificate and designated therein a woman not a relative in whom he had become interested. He had furnished money for many years for the support of the woman and her mother. The wages of the woman otherwise constituted the

chief means of support of herself and mother. The member, some years before his death, informed the woman of the certificate. It was held that she was not a dependent within Hurd's Rev. St. 1909, c. 73, § 258, authorizing certificates for the benefit of persons dependent on the member, and she could not recover on the certificate.

In *Modern Woodmen v. Comeaux*, 79 Kan. 493, 101 Pac. 1, 25 L. R. A. (N. S.) 814, 17 Ann. Cas. 865, it appeared that an unmarried man, without living relatives, held a benefit certificate in an association, in which he was in good standing. Being sick, he entered into an agreement with a neighbor who was keeping a hotel, providing that the name of the hotel keeper should be placed in the certificate as beneficiary, and he should have all the property then owned by such member in consideration of a home at the hotel during life. The name of the hotel keeper was inserted, being designated as a "dependent," and the member made a will bequeathing all his property to the wife of the hotel keeper, and remained at the hotel until his death. It was held that the hotel keeper was not dependent on such member, within Hurd's Rev. St. Ill. 1905, c. 73, § 258, providing for payment of benefits, among others, to "persons dependent on a member."

Where insured in a beneficiary certificate told a woman that, if she would marry a certain man, insured would take care of her while he lived, and she did so, and he furnished a house for her, gave her money, and paid her bills, but her husband when he worked earned \$2 a day, she was not "dependent" upon insured, within the meaning of a by-law of the order (*Caldwell v. Grand Lodge of United Workmen of California*, 82 Pac. 781, 148 Cal. 195, 2 L. R. A. [N. S.] 653, 113 Am. St. Rep. 219, 7 Ann. Cas. 356). So, too, one who is grown and married and has a good salary and is saving money is not a dependent (*Morey v. Monk*, 40 South. 411, 145 Ala. 301).

814 (k). One who has lived with the member as his wife, believing herself to be such, who was dependent upon such member for her support, comes within the statutory definition of "persons dependent upon the member," notwithstanding she was not the lawful wife of such member, although designated as such in the certificate.

Wojanski v. Wojanski, 136 Ill. App. 614; *Starr v. Knights of Macabees*, 27 Ohio Cir. Ct. Rep. 475.

In *Duenser v. Supreme Council Royal Arcanum*, 178 Ill. App. 648, a member of a fraternal benefit society designated the beneficiary as his wife. The person so designated had married the member with knowledge that he had a wife then living. Such person lived with him 12 years before the certificate was issued and 26 years thereafter until his death. She was supported during the whole period as his wife, and was dependent upon him for support. The constitution and laws of the society provided that the benefit might be paid to "persons dependent upon such member," and, further, "to any person who is dependent on such member for maintenance." Section 1 of the statute relating to such societies provides that payment may be made to persons dependent on the member. It was held that the beneficiary named was "dependent" within the constitution and laws of the society and the statute, and the benefit certificate was payable to her.

On the other hand, one who lived with the assured as his concubine is not a dependent person within the meaning of the by-laws of a fraternal benefit society, and is not entitled to the fund as a beneficiary (*Miller v. Prella*, 122 Ill. App. 380). So, too, under a certificate limiting beneficiaries to relatives by blood, marriage, or legal adoption, and persons dependent upon member, the bigamous wife of the deceased, not being related or legally dependent, is not entitled to be a beneficiary (*Applebaum v. Order of United Commercial Travelers of America*, 88 S. E. 722, 171 N. C. 435).

In an action on a benefit certificate by a beneficiary therein alleged to be dependent on the member, only slight evidence of dependence is necessary. *Erickson v. Modern Woodmen of America*, 86 Pac. 584, 43 Wash. 242. Where, plaintiff claimed that the designation of a beneficiary by the insured was invalid because such beneficiary was not dependent on insured, the burden of proof, that the person so designated was not dependent on insured, was on plaintiff. *Kittredge v. Boston Firemen's Mut. Relief Ass'n*, 77 N. E. 648, 191 Mass. 23.

815-816. (1) Objections to eligibility and waiver thereof

815 (1). A provision in the constitution or by-laws of a mutual benefit society, limiting the persons who may be made beneficiaries in certificates issued by it, may be waived by the society (*Alfsen v. Crouch*, 89 S. W. 329, 115 Tenn. 352). But the association cannot waive the restrictions imposed by the law under which it is incorporated as to those who may be designated as beneficiaries under

its certificates (*Bush v. Modern Woodmen of America* [Iowa] 152 N. W. 31).

An objection that a benefit certificate is ultra vires, because the beneficiary is not within the classes named by the by-laws of the association, can be raised only by the association (*Coulson v. Flynn*, 181 N. Y. 62, 73 N. E. 507, affirming 90 App. Div. 613, 86 N. Y. Supp. 1133). If a by-law relating to payment of benefits to cousins of the member restricts payment to cousins of the first degree, such society is not estopped, by its description of a beneficiary in a certificate as a "cousin," from setting up the defense that its action in naming such person as a beneficiary was ultra vires, if the word "cousin" is to be construed as meaning a blood relation further removed than a first cousin (*Rizzo v. Catholic Order of Foresters*, 176 Ill. App. 165).

816 (1). The acceptance of assessments or dues with knowledge that the beneficiary was not eligible is a waiver of the objection.

Tolson v. National Provident Union, 113 N. Y. Supp. 534, 60 Misc. Rep. 460, affirmed in 130 App. Div. 884, 114 N. Y. Supp. 1149; *Coulson v. Flynn*, 181 N. Y. 62, 73 N. E. 507, affirming 90 App. Div. 613, 86 N. Y. Supp. 1133.

But, if the by-laws provide that, where ineligible beneficiary is named, insurance shall be payable to insured's widow and children, the association's acceptance of assessments does not waive provision making a beneficiary ineligible (*Logan v. Modern Woodmen of America* [Minn.] 163 N. W. 292). And, of course, there can be no waiver where the association was without knowledge of the facts and there was nothing in the certificate nor in connection with the designation to put the lodge upon inquiry (*Meyer v. Grand Lodge of Order of Sons of Herman of Minnesota*, 121 N. W. 235, 108 Minn. 25).

Where a by-law provided that if any designation of beneficiaries should fail, the benefit should be paid to certain specified relatives of the member, the issuance of a certificate of membership payable to "person named in will" does not waive the provision of the by-law that benefits shall be paid only to blood relatives or dependents of the member (*Supreme Lodge Knights of Honor v. Bieler*, 58 Ind. App. 550, 105 N. E. 244).

An admission of liability and payment of the money into court waives an objection to the beneficiary (*Pleasants v. Locomotive Engineers' Mut. Life & Acc. Ass'n*, 70 W. Va. 389, 73 S. E. 976, Ann. Cas. 1913E, 490).

816-820. (m) Mode and sufficiency of designation

817 (m). In view of the general rule that a beneficiary must be designated in the manner prescribed by the laws of the association mere verbal statements by the member as to who would get the proceeds of his certificate in the event of his death do not operate to determine who shall be the beneficiary thereof (*Royal League v. Kolin*, 169 Ill. App. 646). And to the same effect is *Supreme Lodge, K. P., v. Rutzler* (N. J.) 100 Atl. 189. But a mere incorrect description of the beneficiary will not defeat a recovery upon the part of an eligible person properly named as beneficiary (*Supreme Council of Royal Arcanum v. Huckins*, 166 Ill. App. 555).

819 (m). If the laws of the association so provide, the designation of a beneficiary may be by will.

Jacob v. Jacob's Ex'r, 89 S. W. 246, 28 Ky. Law Rep. 327; *Middelstadt v. Grand Lodge, Order of Sons of Hermann*, 107 Minn. 228, 120 N. W. 37; *Armstrong v. Walton*, 105 Miss. 337, 62 South. 173, 46 L. R. A. (N. S.) 552, Ann. Cas. 1916E, 137.

By-law of association construed to the effect that proceeds go to member's wife, if any, and, if none, to his children, without regard to any will of the member. *Haberly v. Haberly*, 27 Cal. App. 139, 149 Pac. 53.

Where a mutual benefit policy, limiting beneficiaries to husband and wife and relatives, was payable to a husband, who was later divorced, no right to recover on the policy was given him by the will of his former wife in his favor (*Lawson v. United Benev. Ass'n* [Tex. Civ. App.] 185 S. W. 976).

A member of a fraternal benefit association may direct the beneficiary to distribute fund in accordance with will (*Katz v. Witt*, 134 N. Y. Supp. 675, 74 Misc. Rep. 582). But a member of a beneficial association cannot make a valid bequest of the benefits to one not within the class authorized to become beneficiaries under the laws of the order (*Hawkins v. Duberry*, 101 Miss. 17, 57 South. 919).

Where a beneficial association was chartered for the relief of members and the payment of stipulated sums to the family or heirs of deceased members, and a certificate was issued payable to the member's legal representatives the death benefits were payable to the heirs at law of the member, though he may by will have given such benefits to other parties.

In *re Harton's Estate*, 213 Pa. 499, 62 Atl. 1058, 4 L. R. A. (N. S.) 939; In *re Harton's Estate*, 213 Pa. 505, 62 Atl. 1059.

820-821. (n) Same—Construction

820 (n). A policy of assessment life insurance, designating the wife and children of the assured as beneficiaries, is testamentary in character, and must be construed according to the statute, as well as the provisions of the policy, constitution, and by-laws of the association (*Hall v. Ayers' Guardian*, 105 S. W. 911, 32 Ky. Law Rep. 288). The policy should be construed by the rules applicable to the construction of wills (*Mutual Life Ins. Co. of New York v. Devine*, 180 Ill. App. 422). If a certificate of insurance is issued and made payable to a certain person "as guardian of" certain named grandchildren, the intention of insured that such grandchildren should have the sole benefit of the insurance is sufficiently shown, although the person named as guardian was not then or subsequently appointed guardian of such beneficiaries (*Mee v. Fay*, 76 N. E. 229, 190 Mass. 40).

In construing a life insurance policy, the intent of the insured as to who the beneficiary shall be controls. *Mutual Life Ins. Co. of New York v. Devine*, 180 Ill. App. 422.

Where a fraternal benefit policy was payable in alternative to insured's wife, who did not survive him, or his "legal representatives," "legal representatives" meant executors or administrators (*Vanderbeck v. Protected Home Circle*, 163 N. Y. Supp. 80, 98 Misc. Rep. 691). A designation of a person as the beneficiary "of all benefits or money payable from said Brotherhood" sufficiently designates him as beneficiary of benefits from the treasury of a local union as well as from the treasury of the main society where all members of the local union were ipso facto members of the Brotherhood (*Estes v. Local Union, No. 43, United Brotherhood of Carpenters and Joiners of America*, 97 Atl. 326, 90 Conn. 426).

821-822. (o) Same—Revocation by marriage

821 (o). Where insured's designation of a beneficiary was legal under the rules of the order when made and also at the time of insured's death, the marriage of insured after the certificate was issued did not revoke the prior designation.

Stake v. Stake, 81 N. E. 1146, 228 Ill. 630; *Vanasek v. Western Bohemian Fraternal Ass'n*, 122 Minn. 273, 142 N. W. 333, 49 L. R. A. (N. S.) 141, Ann. Cas. 1914D, 1123; *Green v. Grand United Order of Odd Fellows* (Tex. Civ. App.) 163 S. W. 1068, certified questions answered by Supreme Court Id. 1071.

The designation by an unmarried member of the Policemen's Benefit Association, incorporated under Rev. St. Ohio, § 3630 (Gen. Code, § 9427), of his brothers as beneficiaries of a fund payable at his death by said association, is invalidated by his subsequent marriage, and, death occurring after marriage, such fund should be paid to his widow (*Johnson v. Policemen's Benevolent Ass'n*, 2 Ohio App. 148, 34 Ohio Cir. Ct. R. 245).

12. AMOUNT OF INSURANCE

822-824. (a) Determination of amount in general

822 (a). The premium may be resorted to as an aid in determining the amount of insurance. Thus in *Exchange Mut. Fire Ins. Co. v. Warsaw-Wilkinson Co.*, 181 Fed. 330, 104 C. C. A. 518, a policy issued by a mutual company on deposit by the insured of a sum by way of premium to be subject to assessments contained the following provision: "If the deposit made by the insured at the time this policy is issued should be less than the premium which would be payable on the property hereby insured for the amount of insurance above named, at the rate charged by the majority of the stock companies engaged in fire insurance business in the locality in which this risk is situated, then it is understood and agreed that the amount of insurance contracted for herein and all claims for losses hereon shall be reduced pro rata on the several and separate items thereof." It was held that the purpose of the provision was to put the insurance on a stock company basis; the criterion being the average rate which would be charged by such companies "on the property hereby insured" and was to be determined by taking the stock company rate there in vogue on the same kind of property and not the average on all classes without regard to the nature of the risk.

See, also, *Warsaw-Wilkinson Co. v. Exchange Mut. Fire Ins. Co.* (C. C.) 192 Fed. 668.

823 (a). In *American Ins. Co. v. Dillahunt*, 89 Ark. 416, 117 S. W. 245, the application called for insurance in the sum of \$1,300, \$500 on household goods, \$300 on commissary stock, and \$500 on hay and grain. The policy stated in general terms that it was for insurance in the sum of \$1,300, but in specifying the separate items it failed to mention the item of \$500 on hay and grain. The descriptive clause of the policy was followed by the statement: "For

a more particular description and as forming part of this policy reference is had to assured's application and description of even number herewith on file in the office of this company, a copy of which application is hereto attached." It was held that the policy was a valid contract for insurance in the sum of \$1,300, notwithstanding the omission.

A policy for temporary insurance during the time before a policy could be executed or the risk declined, under the heading of "Amount in figures," contained a figure 5, followed by two ciphers, which were separated from the 5 by a straight line. The space under the heading "Amount insured in writing" was a blank. It was held that the amount of the insurance was \$500, and not \$5. *Jacobs v. Atlas Ins. Co.*, 148 Ill. App. 325.

A renewal agreement of an employers' indemnity policy provided, among other things, that the company "hereby continues in force" a specified insurance contract, provided that the "aggregate liability" of the insurer from the date of the issuance of the contract to the date of the expiration of the renewal agreement on account of each employé named should not exceed the sum written opposite such employé's name. It was held that this was not a new contract, and that judgment could not be given for more than the amount named in the contract (*United States Fidelity & Guaranty Co. v. First Nat. Bank*, 137 Ill. App. 382; *Id.*, 233 Ill. 475, 84 N. E. 670).

824 (a). In the absence of express language showing such an intent, a fire insurance policy will not be construed to be a valued policy so as to preclude full investigation as to the actual value of property lost or destroyed.

Georgia Co-operative Fire Ass'n v. Lanier, 1 Ga. App. 186, 57 S. E. 910; *Delaware Ins. Co. of Philadelphia v. Hill* (Tex. Civ. App.) 127 S. W. 283.

Under a provision in a fire insurance policy which groups several buildings together under various items, and specifies the amount of insurance on each item, that the loss should attach to each of the buildings under the several items in the proportion that the value of each bore to the value of all, the entire amount of the insurance for each item does not apply to any one building thereunder (*E. H. Stanton Co. v. Rochester German Underwriters' Agency* [D. C.] 206 Fed. 978). A fire policy on a complete building in use and undergoing alteration to an amount not exceeding \$3,500 is a policy

for specific sum of \$3,500 (*Smith v. Caledonian Ins. Co. of Scotland*, 195 Mo. App. 379, 191 S. W. 1034).

Credit insurance policy construed with reference to amount of insurance. *Blakelee, Perrin & Darling v. Ocean Accident & Guarantee Corporation*, 166 App. Div. 587, 151 N. Y. Supp. 1038.

825. (b) Life insurance

825 (b). The amount payable under a life policy in the event of death must appear in the policy, and is not to be ascertained through a search of the by-laws and constitution of the insurer (*McPike v. Supreme Ruling of the Fraternal Mystic Circle*, 187 Mo. App. 679, 173 S. W. 71). A contract by a fraternal insurance order, whereby it assumes the obligation of a benefit certificate issued by another order and agrees to pay, on the death of the member, the sum set out "on the face of the original" certificate, binds the order to pay the amount called for in the original certificate, unaffected by any rider increasing the benefits of the certificate attached pursuant to a by-law of the original maker of the certificate (*Hatcher v. National Annuity Ass'n*, 153 Mo. App. 538, 134 S. W. 1). The constitution of a mutual benefit association provided that policies might be issued on a basis of benefits ranging in amounts to \$5,000 and all the money paid in assessments on the policy. It issued a policy which recited that, in consideration of the member's paying a specified sum and all assessments, the association would pay, after satisfactory proof of his death, to the beneficiary \$3,000 "and all money paid on the policy in assessments." It was held that the association agreed to pay on the member's death the face of the policy and all money paid in by him on assessments (*Pearson v. Knight 'Templars' & Masons' Life Indemnity Ins. Co.*, 89 S. W. 588, 114 Mo. App. 283).

Particular contract construed as to amount. *Tourtellotte v. New York Life Ins. Co.*, 144 N. W. 1117, 155 Wis. 455.

Under *Vernon's Sayles' Ann. Civ. St.* 1914, art. 4742, subd. 3, requiring life insurers to state in a single provision the sum payable on insured's death, a clause of a life policy, following the schedule stating amount of insurance, which provided that half only should be payable if death occurred within six months, is void (*American Nat. Ins. Co. v. Hawkins* [Tex. Civ. App.] 189 S. W. 330).

826-827. (c) Same—Limitation to amount of assessment

826 (c). In *Hall v. Royal Fraternal Union*, 130 Ga. 820, 61 S. E. 977, the facts were these: An application for a beneficiary certificate stated that it was an application for a certificate for \$2,000, and the application, accepted by the company, was by its terms made a part of the benefit certificate issued thereon for all purposes. The certificate did not state that the amount was to depend on the event that one assessment during the month of the death of the assured from the membership of the division to which the assured belonged aggregated \$2,000, but stated that the member was entitled to participate in the benefit fund of the order in a sum not to exceed \$2,000. There was a limitation on the back of the certificate that the liability of the order to the beneficiary should not exceed the amount of one assessment actually realized from the membership in the division for the month in which the death occurred. It was held that in construing the inconsistent provisions of the contract the liability of defendant was not limited to the amount of one assessment actually realized for the month in which the insured died, but that the holder of the certificate was entitled to recover the sum of \$2,000.

827-829. (d) Same—Reduction of amount

827 (d). The declaration of the officers of a mutual insurance company fixing the amount of benefits less than that provided by the contract and by-laws is not a part of the contract, unless made known to the assured when he became a member or legally adopted thereafter (*Urick v. Western Travelers' Acc. Ass'n*, 81 Neb. 327, 116 N. W. 48).

829. (e) Questions of practice

829 (e). Where, in an action on a fire insurance policy, the declaration averred that plaintiff was insured "for" a certain amount, while the policy stipulated "to" that amount, the variance was not material, and would not be regarded, since the declaration averred the number of the policy sued on, so that defendant was apprised of its provisions and could not be surprised by the proof (*Mutual Fire Ins. Co. of Montgomery County v. Ritter*, 113 Md. 163, 77 Atl. 388).

13. COMMENCEMENT, DURATION, AND TERMINATION OF RISK**830-834. (a) Commencement of risk**

830 (a). Whenever the particular act is performed which under the circumstances is regarded as completing the contract, the risk commences. Thus in *Hammond v. International Ry. Co.*, 116 N. Y. Supp. 854, 63 Misc. Rep. 437, affirmed in 134 App. Div. 995, 119 N. Y. Supp. 1127, the defendant in New York telegraphed to an insurance company in Massachusetts as to how much insurance it would place. The company stated a certain amount in reply and asked the date of the proposed policy, to which defendant replied on February 4th, stating that the policy should date from February 14th. The policy was executed and dated in Massachusetts, and mailed there on February 6th to defendant in New York; the premiums being payable in Massachusetts. It was held that the policy was a Massachusetts contract, which became effective when it was mailed there. So, too, where an application for fire insurance is made and the terms thereof are agreed on between the insurer's authorized agent and the insured, and it is agreed that a policy embodying such terms shall be issued, the agreement is complete, though credit be extended for the premium, and, where a policy is subsequently issued, it relates back to the time specified for the insurance to begin, and covers a loss within that time (*Roark v. City Trust, Safe Deposit & Surety Co.*, 110 S. W. 1, 130 Mo. App. 401). And it has even been held that the risk under a policy against loss by hail had begun before the policy issued, where the approval of the risk was delayed by the negligent failure of the soliciting agent to forward the application (*Boyer v. State Farmers' Mut. Hail Ins. Co.*, 121 Pac. 329, 86 Kan. 442, 40 L. R. A. [N. S.] 164, Ann. Cas. 1915A, 671, rehearing denied 123 Pac. 742, 87 Kan. 293). But generally a policy not to begin until the premium was paid does not begin until delivery of the policy and payment of the premium (*Cecil v. Kentucky Livestock Ins. Co.*, 165 Ky. 211, 176 S. W. 986).

In *Allen v. Patrons' Mut. Fire Ins. Co. of Michigan*, 165 Mich. 18, 130 N. W. 196, it appeared that the by-laws of the company provided that policies should be signed by the president and secretary and should take effect on the date of issue. The company's records showed that a policy was dated and signed be-

fore the day of the fire, and that an earlier policy issued on another application was canceled on that day and the new policy put in force. It was held that the company was liable on the new policy, though the insured was not notified of its issuance before the fire, and did not receive it until three weeks later. Where agents for several companies, being notified that a policy on plaintiff's property would be canceled, wrote a policy in another company, the second policy did not become effective; the cancellation not having been effective (*Tacoma Lumber & Shingle Co. v. Fireman's Fund Ins. Co.*, 87 Wash. 79, 151 Pac. 91).

A fire insurance policy, dated December 22, 1905, insuring plaintiff for one year from noon of that day, was delivered to him within a day or two after its date. The amount of the insurance stated in the body of the policy differed from that stated on a typewritten slip attached, which was incorrect. The slip was corrected by the company's agent on January 29, 1906, at which time plaintiff paid the premium. The agent had agreed, on December 22, 1905, to issue the policy, and had then told plaintiff he would send it to him, but that he was insured from that date. Plaintiff testified that he paid the premium on the policy for the year beginning December 22, 1905. In view of these facts it was held in *Reynolds v. German American Ins. Co.*, 107 Md. 110, 68 Atl. 262, 15 L. R. A. (N. S.) 345, that the risk began on Dec. 22, 1905.

831 (a). Under a charter of a mutual insurance company, providing that written applications for insurance shall not constitute a contract until accepted by the home office, and that insurance shall be issued only to members, declarations of soliciting agent that insurance began from the date of the receipt of the premium cannot be considered (*McGrath v. Piedmont Mut. Ins. Co.*, 54 S. E. 218, 74 S. C. 69). But under the constitution and by-laws of a mutual fire association, providing that an applicant becomes a member from the commencement of the risk, an application for membership and for insurance, providing that insurance takes effect from date of the application, constituted a contract of insurance from that date and before issuance of the policy (*Tucker v. Farmers' Mut. Fire Ass'n*, 71 W. Va. 690, 77 S. E. 279).

Where a written application for insurance of live stock provides that no liability shall attach until the application has been approved by the home office, the insurance company is not liable for loss of the stock before such approval, though the applica-

tion has been delivered to the agent of the insurer (*Johnston v. Indiana & Ohio Live Stock Ins. Co.*, 94 Neb. 403, 143 N. W. 459).

833 (a). A fire policy, issued to indemnify a railroad company for its liability as a common carrier of cotton, covers a loss of cotton for which no bill of lading was issued until it was actually burning, though the policy provided that the liability should begin at the time the bill of lading was issued and when delivered (*Bennettville & C. R. Co. v. Glens Falls Ins. Co.*, 79 S. E. 717, 96 S. C. 44).

That the petition alleged that the insurance contract should be in full force from noon of a certain day, and the evidence showed that it was to be in force from between 8 and 9 o'clock a. m. on such day, does not constitute a material variance, where the loss by fire occurred several days later. *Willson v. German American Ins. Co.*, 95 Neb. 774, 146 N. W. 945.

836-839. (c) Duration of risk

837 (c). Unless a policy of fire insurance is canceled by mutual consent or the policy provides that it may be terminated at the option of the parties and is so terminated, it will continue in force for the term for which it is written (*Scheel v. German-American Ins. Co.*, 76 Atl. 507, 228 Pa. 44). So, too, it has been held that a contract insuring property against fire in a specified amount for a premium of \$1.25 per \$1,000 will be assumed a contract for a time long enough to carry the liability beyond the date of a fire occurring three days after the making thereof (*New Hampshire Fire Ins. Co. v. Blakely*, 97 Ark. 564, 134 S. W. 926).

An oral contract to "cover" means insurance for a reasonable time under all the circumstances. *Mowles v. Boston Ins. Co.*, 226 Mass. 426, 115 N. E. 666.

In *Evans v. Glens Falls Ins. Co.*, 38 Utah, 461, 113 Pac. 1019, it appeared that the defendant company issued a policy of insurance to plaintiff to expire September 25, 1907. In October, 1906, a person acting as plaintiff's agent obtained from defendant's agent, a reduction of the amount of the policy and of the premium, nothing being said as to an extension, and the agent in granting the reduction on a slip attached to the policy inadvertently wrote "1909" for "1907" as the time when the policy expired. In May, 1907, the plaintiff received the policy with the slip attached; the loss occurring in November, 1907. It was held that the defendant was not estopped by its conduct or laches from asserting that the indorsement was a mistake, and that it did not intend thereby to extend the term of insurance.

838 (c). The Kansas statute (Gen. St. 1901, § 3560) provides that all policies issued by hail insurance companies shall expire on the 1st day of April in the year following that in which they were written. A by-law of such an association provided that no loss would be paid occurring to grain after July 25th, at noon. It was held that it was competent for such an insurance company to agree that no risk should be assumed for grain left standing after such time (*Kansas State Mut. Hail Ass'n v. Prather*, 79 Pac. 1080, 71 Kan. 179). According to the terms of a hail policy involved in *Flakne v. Minnesota Farmers' Mut. Ins. Co.*, 105 Minn. 479, 117 N. W. 785, the period of insurance terminated at noon September 1st, and according to the by-laws the company was not liable after September 1st. The by-laws as subsequently amended exempted defendant from liability after noon September 1st. The contract authorized amendments to the by-laws. It was held that as a matter of law plaintiff could not recover for loss of crops by hail after noon of September 1st.

Where a hail policy provided that the company should not be liable after noon September 1st, amendment to the by-laws of the company conforming the period specified in the by-laws to that stated by the policy was reasonable. *Flakne v. Minnesota Farmers' Mut. Ins. Co.*, 117 N. W. 785, 105 Minn. 479.

Generally a policy of insurance will not terminate while the destruction of the property by the risk insured against is actually in progress. Thus, where a fire had begun in a building containing merchandise before the expiration of the policy insuring the merchandise, and it was impossible to save it from injury, the loss occurred during the life of the policy, whether or not the fire was actually communicated to the merchandise within that time (*Rochester German Ins. Co. v. Peaslee-Gaulbert Co.*, 89 S. W. 3, 28 Ky. Law Rep. 130, 1 L. R. A. [N. S.] 364, 120 Ky. 752, 9 Ann. Cas. 324). But in the same case it was held further that defendant was not liable for a loss which was inevitable at the time the policy expired, provided the fire had not then attacked the warehouse.

A "drummer floater" insurance policy is a policy that covers the goods mentioned therein, while a commercial salesman is on the road selling goods, and the samples and goods carried by him would not be covered by the ordinary insurance carried upon merchandise located in the stores or warehouses of the merchant. When the goods are returned to the starting point and are in the store or not traveling, the drummer floater insurance is suspended, and the same

goods are then covered by the general insurance which the merchant carries upon all his goods in his store or warehouse (*Jacobson v. Liverpool, L. & G. Ins. Co.*, 135 Ill. App. 20, judgment affirmed 83 N. E. 95, 231 Ill. 61).

839 (c). Plaintiff declared on a policy of fire insurance alleged to have been made for one year to September 25, 1907, and to have been modified in October, 1906, by reducing the insurance and extending the policy for two years until September 25, 1909, and that it was in force at the time of loss November, 1907, which allegations were denied by the defendant. Plaintiff introduced the policy, in the body of which the date of expiration was stated as September 25, 1907, and on the back of which it was stated that it expired September 25, 1907, and that the premium was \$41.70. A slip attached to the policy showing a reduction of the policy and the premium stated: "Insurance under this policy is hereby reduced to \$2500. Premium reduced to \$34.75"—and on the margin of the slip were indorsements, "Extra Premium, \$Nil, Return Premium, \$6.95, Amount of Policy, \$3000, and Date of expiration, Sept. 25, 1909." The date of expiration thus shown was an apparent clerical error made at the time the policy was reduced. It was held that the plaintiff had not sustained the burden of proof, since the words in the margin of the slip were merely words and figures descriptive of the policy, and not a substantial modification of it (*Evans v. Glens Falls Ins. Co.*, 38 Utah, 461, 113 Pac. 1019).

Where the issue was whether the contract was in force on April 19th, the day of the loss, or whether it expired 24 hours earlier, a special finding that it was not the intention of the parties that the insurance should cease at noon on April 18th was not in conflict with a general verdict for insurer and a special finding that the insurance was not in force at the time of the loss. *Law v. Northern Assur. Co. of London*, 165 Cal. 394, 132 Pac. 590.

839-840. (d) Same—Policy expiring "at noon"

839 (d). Where a New York insurance policy was issued on property located in Virginia, and provided that it should expire "at noon" on a certain day, the contract, being performable in Virginia, was not governed by Laws N. Y. 1892, p. 1491, c. 677, § 28, providing that an act required to be performed within a specified time should be performed according to standard time (*Globe & Rutgers Fire Ins. Co. of New York v. David Moffat Co.*, 154 Fed. 13, 83 C. C. A. 91).

841-843. (f) Termination of insurance—Marine policies

841 (f). Insurers severally insured parts of the cargo of a sailing vessel against sea perils on a voyage from Seattle to Alaskan ports. After reaching the port which was the termination of the voyage, and discharging a part of the cargo for that port, the vessel again went to sea for the purpose of discharging cargo at another port which she had passed without stopping owing to unfavorable weather, and before reaching it was wrecked. It was held that the voyage covered by the insurance terminated when the vessel reached her port of final destination, and that the insurers were not liable for cargo lost after she had voluntarily left such port (Alaska Banking & Safe Deposit Co. of Nome, Alaska, v. Maritime Ins. Co. [D. C.] 156 Fed. 710).

843-846. (g) Life and accident insurance

843 (g). The commencement of the risk in life and accident insurance will, in the absence of any stipulation to the contrary, be regarded as coincident with the completion of the contract, whether such completion take place on the approval of the application, the payment of the first premium or the delivery of the policy.

Rushing v. Manhattan Life Ins. Co. of New York, 224 Fed. 74, 139 C. A. 520; *Waters v. Security Life & Annuity Co.*, 57 S. E. 437, 144 N. C. 663, 13 L. R. A. (N. S.) 805; *Donahue v. Mutual Life Ins. Co. of New York* (N. D.) 164 N. W. 50; *Mercer v. South Atlantic Life Ins. Co.*, 69 S. E. 961, 111 Va. 699.

844 (g). It is, however, sometimes provided that the policy shall take effect from its date. Thus in *Rayburn v. Pennsylvania Casualty Co.*, 138 N. C. 379, 50 S. E. 762, 107 Am. St. Rep. 548, it was said that where insurance is applied for, and afterwards a policy is issued and delivered, it is based on the status of the insured at the time of the application, and the insurer assumes the risk after the date of the policy. Consequently an accident insurance policy takes effect from its date, unless it is stated that it shall only take effect on certain conditions, in which case it takes effect as of the day of its date upon compliance with the conditions and the delivery of the policy. And in *Monahan v. Fidelity Mut. Life Ins. Co.*, 148 Ill. App. 171, affirmed in 242 Ill. 488, 90 N. E. 213, 134 Am. St. Rep. 337, it was said that notwithstanding it is provided in the contract of insurance that a policy shall not become binding until actual payment of the final premium, yet the policy (the first premium having been actually properly paid) becomes effective for all

insurance purposes from the day of its date. Where a policy was dated May 22, 1908, and issued July 6, 1908, conditioned that the insurer would not be liable in the event of suicide within the year after the issuance of the policy, the risk commenced on the day the policy was dated, and hence that upon suicide of the insured June 12, 1909, the insurer was liable (*Anderson v. Mutual Life Ins. Co. of New York*, 130 Pac. 726, 164 Cal. 712, Ann. Cas. 1914B, 903). So, too, where a policy, dated October 11th, declared that no obligation was assumed by company prior to that date, nor unless on that date insured was alive and in good health, the policy went into effect on October 11th, and, if a binding contract was otherwise consummated, covered insured's death on that day (*Metropolitan Life Ins. Co. v. Thompson* [Ga. App.] 93 S. E. 299).

Application for life policy construed to show an intention that it should not be deemed to have been accepted until policy was delivered and the first premium paid, when it should relate back to the date of the application. *Goldstein v. New York Life Ins. Co.*, 176 App. Div. 813, 162 N. Y. Supp. 1088.

845 (g). A life insurance contract continues in force during the life of the assured, and can be terminated before his death and against his will only by his breach of some obligation imposed upon him by its terms (*Wayland v. Western Life Indemnity Co.*, 166 Mo. App. 221, 148 S. W. 626). An accident policy reciting that the insurance is for the term of one year beginning on the 23d of October, 1901, and ending on the 23d of October, 1902, is a continuing contract beginning and ending on the days specified, although it is not delivered, and the premium is not paid, until October 30, 1901 (*Rayburn v. Pennsylvania Casualty Co.*, 50 S. E. 762, 138 N. C. 379, 107 Am. St. Rep. 548).

A policy insuring against accidents within one year from 12 o'clock noon, December 11, 1902, did not cover an accident at 4 p. m. December 11, 1903. *Matthews v. Continental Casualty Co.*, 93 S. W. 55, 78 Ark. 81.

Under life policy issued August 17, 1910, on application made August 8 for a term of five years ending August 8, 1915, the insurer is not liable, where death occurred August 12, 1915. *Talbot v. Union Cent. Life Ins. Co. of Cincinnati, Ohio*, 241 Fed. 669, 154 C. C. A. 427.

A clause in a health and accident policy providing that, if one person only over 18 and under 60 years should be named as beneficiary, the policy should insure such person, applied to the bene-

ficiary after the expiration of the age limit of 60 years (*Cook v. National Fidelity & Casualty Co.*, 100 Neb. 641, 160 N. W. 957).

846 (g). An allegation in an action on a policy dated May 23, 1904, that it was issued and delivered "on, to wit, July 17, 1904," was not a positive one, and it would be presumed that the policy went into force on the day of its date (*Rose v. Mutual Life Ins. Co.*, 144 Ill. App. 434, judgment affirmed 240 Ill. 45, 88 N. E. 204).

The complaint, in an action on an insurance policy must contain a description of the policy sued on to the extent of its date and the term of its operation. *United States Health & Accident Ins. Co. v. Savage* (Ala.) 64 South. 340; *Pence v. Mutual Benefit Life Ins. Co.*, 180 Ala. 588, 61 South. 817.

846-847. (I) Casualty and guaranty insurance

846 (i). A policy to indemnify insured against loss for injuries to persons while using elevators in insured's building may stipulate that insurer shall not be liable before the building and elevators are completed, and the stipulation will be enforced unless waived by insurer (*Scarritt Estate Co. v. Casualty Co. of America*, 149 S. W. 1049, 166 Mo. App. 567). Under an employers' liability contract, the company is liable by reason of loss sustained by the insured from injuries incurred after the expiration of the policy, where the company had issued a binder validly extending the policy beyond the time of the occurrence of the injury (*London Guarantee & Accident Co. v. Mississippi Cent. R. Co.*, 97 Miss. 165, 52 South. 787). Such a contract and certificates of renewal thereof constitute but one contract of indemnity (*United States Fidelity & Guaranty Co. v. Citizens' Nat. Bank of Monticello*, 143 S. W. 997, 147 Ky. 285, motion to correct judgment overruled 145 S. W. 750, 147 Ky. 810).

An application for insurance against loss through dishonesty of an employé was made July 23d, with the request that it be dated back to July 15th. The employer signed a statement by filling out a blank furnished by insurer. The application and statement were delivered to the agent of the insurer, and the premium was paid to him. The terms of the insurance were agreed on, and they were to become binding on the insurer receiving satisfactory responses from references furnished to it. The responses were received and were found satisfactory, and the application was indorsed as approved on August 15th. It was held that the contract of insurance became binding from that time, though the policy was not issued until afterwards (*Roark v. City Trust, Safe Deposit & Surety Co.*, 110 S. W. 1, 130 Mo. App. 401). A bond procured by a state offi-

cer to be issued by a bonding company to the state guaranteeing the faithful performance of his duties, which is indefinite as to duration, may be regarded as continuing in force during the incumbency of such officer on his present term and where the consideration for the bond was the payment in advance of the specified premium, he will be liable for such payment during the term for which the company is liable to the state on his bond (*Bryant v. American Bonding Co.*, 77 Ohio St. 90, 82 N. E. 960). And in the same case it was also said that, if the application for an indemnity bond to the state for the performance of the duties of an officer thereof imports that the bond is to run indefinitely one year at a time and that the contract shall continue only on mutual consent by both the parties and the officer refuses to assent to a renewal and to pay the annual premium, the obligation of the company under the bond to the state for future conduct of the officer does not attach. A continued employment of the principal in the fidelity bond by plaintiff furnished a valuable consideration for the continuing liability of the sureties on the bond which expressly provided for a continuous liability during the period of employment (*Stamets v. Plano Mfg. Co.*, 82 N. E. 122, 923, 40 Ind. App. 620). A fidelity policy, insuring a bank against loss occasioned by its assistant cashier, owning 5 per cent. of the capital stock of the bank, is terminated when the assistant cashier, without notice to insurer, acquires a majority of the stock of the bank, and becomes a director, and acts as cashier, since the object of the policy is not to insure the employer against his own fraudulent acts (*Farmers' & Merchants' State Bank of Verdon v. United States Fidelity & Guaranty Co.*, 28 S. D. 315, 133 N. W. 247, 36 L. R. A. [N. S.] 1152).

Under a bond to indemnify a town from any loss through its treasurer, elected for an annual term, providing that liability should cease in one year from expiration of the stated term of office, insured could not enforce any claim after such time (*MacDonald v. Aetna Indemnity Co.*, 96 Atl. 926, 90 Conn. 226). The provisions of a fidelity insurance bond limiting liability thereon to losses discovered within six months after the employes whose fidelity was insured ceased to occupy their positions and within six months after the expiration of the bond, and requiring suit to be brought within one year after the termination of the bond, are valid and enforceable provisions (*Ladies of Modern Maccabees v. Illinois Surety Co.* [Mich.] 163 N. W. 7).

Successive annual bonds guaranteeing against loss from embezzlements of officers are a continuing contract, covering all losses that occurred from their first issuance, irrespective of the time of renewals and their relation to the time of loss (*United States Fidelity & Guaranty Co. v. Shepherds' Home Lodge No. 2*, 163 Ky. 706, 174 S. W. 487). Although a renewal bond was not executed until December 4, 1903, a clause therein providing that "losses occurring on goods shipped on and after October 1, 1903," should be included thereunder, and not under the first bond, made the second bond effective for all purposes from that date (*Philadelphia Casualty Co. v. Fechheimer*, 220 Fed. 401, 136 C. C. A. 25, Ann. Cas. 1917D, 64).

Sufficiency of the evidence to show a termination of an employer's liability contract, see *Hill v. Maryland Casualty Co.*, 12 Cal. App. 461, 107 Pac. 707. Sufficiency of the evidence to show that insured had discontinued business considered in an action on a credit insurance policy, which provided that the bond would be terminated upon the discontinuance of the business by the parties indemnified, see *Cohen v. America Credit Indemnity Co.* (Sup.) 119 N. Y. Supp. 700.

14. RENEWAL OF THE CONTRACT

847-848. (a) Form and validity in general

848 (a). Where insurance brokers of Virginia, engaged by plaintiff to place insurance upon certain property, renewed a policy which had been canceled, and plaintiff ratified their act, plaintiff was entitled to recover on the renewal policy, for one may, even in his own name, insure the property of another for the benefit of the owner, and that insurance will, upon subsequent adoption, inure to the benefit of the owner (*Benedict v. Security Ins. Co.*, 133 N. Y. Supp. 165, 147 App. Div. 810). Payment of annual premiums on an accident insurance policy, pursuant to its terms, was not a new contract, but merely extended the original contract; the policy expressly providing for renewal by payment of annual premium in advance (*Standard Accident & Life Ins. Co. of Detroit, Mich. v. Wood*, 82 Atl. 702, 116 Md. 575). And under the California statute (Civ. Code, §§ 1582, 1583) the insurer's act in sending renewal slips to insurer's agent would complete an agreement for the renewal of a policy (*American Can Co. v. Agricultural Ins. Co. of Watertown, N. Y.*, 27 Cal. App. 647, 150 Pac. 996). It was, however, held in *Pacific Mut. Life Ins. Co. of California v. Vogel*, 232 Fed. 337, 146 C. C. A. 385, that the delivery of a renewal premium receipt did

not extend the insurance, but was a mere offer, which the insured might accept by payment of premium or doing of acts showing intent to renew insurance.

The agent of a fire insurance company, who makes agreement with the insured to write a policy and look after it during the life of a loan, had authority to renew the policy (*Marysville Mercantile Co. v. Home Fire Ins. Co.*, 121 Pac. 1026, 21 Idaho, 377). However, an insurance agent cannot bind the company without its authority by an agreement to extend a standard policy on its expiration (*Oklahoma Fire Ins. Co. v. Fay Mercantile Co.* [Okl.] 153 Pac. 127). And an insurance agent, directed to renew insurance, has no right to select another company (*Ferguson v. Northern Assur. Co. of London*, 26 S. D. 346, 128 N. W. 125).

The sufficiency of the complaint in an action for breach of an insurance company's contract to reinsure at the expiration of an existing policy is considered in *Georgia Home Ins. Co. v. Kelley* (Ky.) 113 S. W. 882.

849-850. (b) Nature and construction of renewal contracts

849 (b). Generally speaking, a renewal of a fire insurance policy constitutes a new contract (*Guptill v. Pine Tree State Mut. Fire Ins. Co.*, 84 Atl. 529, 109 Me. 323). So a fire policy in the same terms as, but making no reference to, one expiring the day before, is not a renewal of the other one, so as to cover a building put up during the term of the older policy; the policies being on certain of the buildings of a manufacturing plant and additions which may be made (*Arlington Co. v. Empire City Fire Ins. Co.*, 101 N. Y. Supp. 772, 116 App. Div. 458).

850 (b). Where the contract between insured and the agent is to renew a policy of insurance, and there is no evidence introducing new terms, the presumption is that the renewal is for the same time, terms, premium, property, and with the same insurer, for a request to renew a policy implies that the new policy shall be similar to the old.

Etna Ins. Co. v. Short, 124 Ark. 505, 187 S. W. 657; *Georgia Home Ins. Co. v. Kelley* (Ky.) 113 S. W. 882; *Ferguson v. Northern Assur. Co. of London*, 26 S. D. 346, 128 N. W. 125; *Orient Ins. Co. v. Wingfield*, 49 Tex. Civ. App. 202, 108 S. W. 788.

The sufficiency of the evidence to sustain a finding that insured did not receive a fire policy as renewal of insurance covering more property is considered in *Columbus Dry Goods Co. v. Globe & Rutgers Fire Ins. Co.*, 127 N. Y. Supp. 589, 142 App. Div. 561, affirmed in 206 N. Y. 662, 99 N. E. 1105.

851. (c) Same—Conditions of insurance

851 (c). Unless otherwise expressed, a renewal of a policy of insurance, though a new contract, will be construed to be subject to the conditions of the original policy (*Bickford v. Aetna Ins. Co.*, 63 Atl. 552, 101 Me. 124, 8 Ann. Cas. 92). On an agreement to renew a policy the insured may take it for granted that the terms of the renewal policy would be the same as the original (*J. R. Roberts & Son v. National Ins. Co.*, 2 Ohio App. 463, 35 Ohio Cir. Ct. R. 212). But while the mere renewal of an insurance policy does not change its terms, but continues the rights of the parties under the original policy, the parties may change the terms of the contract upon a renewal (*National Life & Accident Ins. Co. v. Lokey*, 166 Ala. 174, 52 South. 45). However, where a contractor orally arranged that an industrial policy should be extended on payment of premiums, he is not bound by a limitation of liability in the new policy, which was not delivered, and which the agent merely told him was more extensive (*Southwestern Surety Ins. Co. v. Thompson* [Tex. Civ. App.] 180 S. W. 947).

851-852. (d) Renewal of guaranty policies

851 (d). A surety bond for an employé, issued on an application made by the employer, was expressly limited to the term of one year, but provided for its renewal on the payment of a like or agreed premium annually "so long as the employer may wish to continue this bond and the company shall consent to receive such premium." It was held that renewals were left as a matter for future contracts between the parties, and that, where new applications therefor were required and made, they, and not the original application, governed as to the renewal terms based thereon (*Danvers Sav. Bank v. National Surety Co.*, 166 Fed. 671, 92 C. C. A. 423). The renewal of a fidelity bond is not a continuing bond with the original one, and the liability under each bond is for such losses only as occur during its separate life, fixed by the contract (*United States Fidelity & Guaranty Co. v. Williams*, 96 Miss. 10, 49 South. 742). Even if the bond be void for omission of the application therefor to disclose that the employé had the option of working on a commission basis, its renewal, being a separate and distinct contract, made on a new consideration received and retained, and on a statement disclosing that the employé was then being paid by commissions on his sales, is binding (*Long Bros. Grocery Co. v. United States Fidelity & Guaranty Co.*, 110 S. W. 29, 130 Mo. App. 421).

Where a bond guaranteeing the fidelity of an employé as to a

specific duty, and not issued for a definite term, is renewed by the payment of a premium to "continue in force," the receipts for the premiums serve only to extend to a new period of time the indemnity provided in the bond, and do not add any new liability (*John Church Co. v. Aetna Indemnity Co.*, 80 S. E. 1093, 13 Ga. App. 826). A renewal of a policy or bond constitutes a separate and distinct contract for the period covered thereby, and, where the renewal receipt recites a renewal in accordance with the terms of the bond, it is a contract with the same terms as evidenced by the bond renewed (*Commercial Bank v. American Bonding Co.*, 194 Mo. App. 224, 187 S. W. 99). But an extension of a fidelity bond does not extend the contract time for bringing suit for defalcations occurring within the period of the original bond (*Ladies of Modern Maccabees v. Illinois Surety Co.* [Mich.] 163 N. W. 7).

A transaction increasing the premiums for an employer's liability policy, the terms being left the same, is equivalent to making a new contract of insurance (*Ocean Accident & Guaranty Corp., Limited, of London, Eng., v. Combined Locks Paper Co.*, 162 Wis. 255, 156 N. W. 156).

Where defendant agreed with plaintiff insurance company to renew indemnity insurance policies issued for one year December 15, 1913, for two consecutive terms of 12 months, tender of such renewals on December 10, 1914, by plaintiff to defendant's authorized broker and agent, there is a full compliance with terms of agreement. *Fidelity & Deposit Co. of Maryland v. J. G. McCrory Co.*, 177 App. Div. 493, 164 N. Y. Supp. 561.

An insurance agent had power to make contracts for credit insurance and issued a bond expiring May 1, 1906. The bond provided that if insured should take out a renewal, and pay the premium before the expiration of the bond, losses during the term of the new bond on goods sold within the preceding 12 months should be covered thereby. At the expiration of the first bond, the insured was away from home, but on May 11th agreed to take a bond, provided it covered the back sales under the old bond and the agent accepted the new bond taking a note for the premium, both note and bond being dated May 1, 1907, thus continuing the old bond in force. It was held that, where the company did not repudiate the bond nor the note given for the premium, losses occurring during the term of the renewal on goods delivered within the preceding 12 months were covered by the renewal bond (*American Credit Indemnity Co. of New York v. Hecht & Co.*, 137 Ky. 261, 125 S. W. 697, rehearing denied 137 Ky. 261, 129 S. W. 340).

VII. REFORMATION AND MODIFICATION OF THE CONTRACT

1. REFORMATION OF INSURANCE CONTRACTS

854-856. (a) Right to reformation in general

854 (a). The rules as to the reformation of written instruments apply to an insurance policy in the same manner as to other contracts (*Lake View Brewing Co. v. Commerce Ins. Co. of Albany*, 143 App. Div. 665, 128 N. Y. Supp. 337). Hence, on a clear showing that through fraud or mistake the policy does not express the intent of the parties, it will be reformed.

Phoenix Ins. Co. v. State, 76 Ark. 180, 88 S. W. 917, 6 Ann. Cas. 440; *Overland Southern Motor Co. v. Maryland Casualty Co. (Ga.)* 92 S. E. 931; *McCarl v. Travelers' Ins. Co.*, 151 Iowa, 669, 132 N. W. 12; *German American Ins. Co. of New York v. Darrin*, 103 Pac. 87, 80 Kan. 578; *Sloss-Sheffield Steel & Iron Co. v. Aetna Life Ins. Co.*, 74 N. J. Eq. 635, 70 Atl. 380; *Wilson v. Life Ins. Co. of Virginia*, 155 N. C. 173, 71 S. E. 79; *Phoenix Ins. Co. of Brooklyn, N. Y., v. Ceaphus (Okl.)* 151 Pac. 568; *Komula v. General Accident Fire & Life Assur. Corp., Limited, of Perth, Scotland*, 165 Wis. 520, 162 N. W. 919.

However, if a fire policy issued was not in accordance with the contract of the parties, and was not accepted by insured, who returned it, and the policy was subsequently canceled by insurer, the policy was not the subject of reformation, but the liability of insurer must rest, if at all, on the verbal agreement originally made between the parties for a policy (*Jefferson Fire Ins. Co. of Philadelphia v. Greenwood* [Tex. Civ. App.] 141 S. W. 319). So, too, an insurance company having copies of policies in its possession for several months is bound to know what property the policies cover, and cannot wait until after the property has been destroyed before filing a bill for reformation on the ground of mistake as to the property covered by the policies (*National Union Fire Ins. Co. v. John Spry Lumber Co.*, 85 N. E. 256, 235 Ill. 98). And where a special contract of insurance purporting to fix insured's share in the surplus at a specified sum, issued by an associate general agent before the issuance and delivery of the policy, was not binding on insurer as a final expression of the rights of the parties, or where the special contract did not, in fact, guarantee insured's share in the surplus in such sum, or where insured nullified the special contract

by applying for a policy, such as he in fact received and kept for many years without complaint, insured could not sue to reform the policy so as to guarantee his share in the surplus at the specified sum (*Langdon v. Northwestern Mut. Life Ins. Co.*, 92 N. E. 440, 199 N. Y. 188, affirming judgment 115 N. Y. Supp. 1128, 131 App. Div. 922).

A suit to reform a hail insurance policy, so as to apply to plaintiff's land, cannot be defeated by reason of provisions for arbitration applying only to loss (*Mahoney v. Minnesota Farmers' Mut. Ins. Co.* [Minn.] 161 N. W. 217).

A purchaser of property covered by an insurance policy, providing that it should be void, unless otherwise agreed, in case of any change of title, is not entitled to reformation of the policy after a loss by making it payable to him (*Plockzek v. St. Paul Fire & Marine Ins. Co.* [N. J. Ch.] 91 Atl. 812).

In suit to reform a fire policy for mutual mistake as to the buildings insured, against a company reinsuring, that the original company had paid a loss on buildings not specifically covered by the policy does not estop defendant from objecting to the reformation. *Vial v. Norwich Union Fire Ins. Society of Norwich, Eng.*, 172 Ill. App. 134, judgment affirmed 100 N. E. 929, 257 Ill. 355, 44 L. R. A. (N. S.) 317, Ann. Cas. 1914A, 1141. A mistake of a subordinate officer in collecting assessments does not estop defendant, a fraternal society, from denying there was a mistake by its high court in issuing the certificate. *Seery v. Catholic Order of Foresters*, 176 Ill. App. 307.

860-862. (d) Mistake of complaining party

860 (d). Where the mistake is wholly the mistake of the broker employed by the insured, reformation at the suit of the insured will not be granted (*Fredman v. Consolidated Fire & Marine Ins. Co. of Albert Lea*, 104 Minn. 76, 116 N. W. 221, 124 Am. St. Rep. 608). But equity may correct mistakes in an insurance policy where insured acted on the superior judgment of the insurance agent, though the mistake is partly one of law (*Southern States Fire Ins. Co. v. Vann*, 69 Fla. 544, 68 South. 645).

861 (d). The rule that the negligence of the insured in retaining the policy will preclude relief in equity is not strictly applied. In *Farwell v. Home Ins. Co.*, 136 Fed. 93, 68 C. C. A. 557, the complainant employed brokers to obtain \$60,000 of insurance on plantation buildings, which it was found necessary to distribute among 20 different insurers. In order to have the policies read exactly alike, riders were printed containing a description of the property,

and a provision for concurrent insurance to the extent of \$60,000, which were used on all but one of the policies, on which a printed rider previously used by complainant's grantor, providing only for \$45,000 concurrent insurance, was used by mistake. The policies were similar in form, each containing about 4,000 words. It was held that the complainant was not guilty of negligence, in failing to read the policy before loss and discovering the mistake, precluding a reformation.

862-864. (f) Necessity of mistake or fraud by defendant

862 (f). An insurance policy will not be reformed to conform to the alleged actual intent of parties, unless there was mutual mistake, or mistake on one side and fraud on the other.

Hammond v. Western Casualty & Guaranty Ins. Co. (Kan.) 165 Pac. 291; *Springfield Fire & Marine Ins. Co. v. Snowden*, 191 S. W. 439, 173 Ky. 664; *Decker v. Scottish Union & Nat. Ins. Co.*, 83 N. J. Eq. 531, 91 Atl. 94; *Koch v. Commonwealth Ins. Co. of New York (N. J. Oh.)* 99 Atl. 920; *Great Eastern Casualty Co. v. Thomas (Tex. Civ. App.)* 178 S. W. 608.

Where a local insurance agent issuing a fire policy on the separate property of a wife in the name of her husband knew that the property belonged to the wife and by inadvertence inserted the name of the husband and there was no fraud, the policy could be reformed (*Gaskill v. Northern Assur. Co.*, 73 Wash. 668, 132 Pac. 643).

864-866. (g) Mutual mistake—General rule

864 (g). Where the evidence establishes the fact of a mutual mistake reformation will be granted.

The rule is applied in the following cases where the mistake was as to the person or interest insured: *Merchants' Mut. Fire Ins. Co. of Colorado v. Harris*, 51 Colo. 95, 116 Pac. 143; *Phenix Ins. Co. v. Hilliard*, 59 Fla. 590, 52 South. 799, 138 Am. St. Rep. 171; *Niagara Fire Ins. Co. v. Jordan*, 134 Ga. 667, 68 S. E. 611, 20 Ann. Cas. 363; *Scottish Union & National Ins. Co. of London, England, v. Jordan*, 134 Ga. 673, 68 S. E. 613; *Dalton v. Milwaukee Mechanics' Ins. Co.*, 126 Iowa, 377, 102 N. W. 120; *Same v. German Ins. Co. of Freeport, Ill. (Iowa)* 102 N. W. 1131; *Dalton v. Westchester Fire Ins. Co. of New York (Iowa)* 102 N. W. 125; *Dalton v. Agricultural Ins. Co. of Watertown, N. Y. (Iowa)* 102 N. W. 125; *Dalton v. Providence-Washington Ins. Co. of Providence (Iowa)* 102 N. W. 126; *Kelsey v. Agricultural Ins. Co. of Watertown, N. Y.*, 78 N. J. Eq. 378, 79 Atl. 539; *Dearborn v. Niagara Fire Ins. Co. of City of New York*, 17 N. M. 223, 125 Pac. 606; *Salomon v. North Brit-*

ish & Mercantile Ins. Co. of New York, 135 N. Y. Supp. 806, 150 App. Div. 728; *Gregan v. Northwestern Nat. Ins. Co. of Milwaukee, Wis.*, 88 Or. 278, 163 Pac. 588.

In *Hadley v. Travelers' Ins. Co.*, 68 Misc. Rep. 359, 125 N. Y. Supp. 88, the mistake was in the designation of the beneficiary.

In these cases the mistake was in the description of the property intended to be insured: *Phoenix Assur. Co. of London v. Boyett*, 90 S. W. 284, 77 Ark. 41; *Norman v. Kelso Farmers' Mut. Fire Ins. Co.*, 114 Minn. 49, 130 N. W. 13; *Mahoney v. Minnesota Farmers' Mut. Ins. Co. of Minneapolis*, 136 Minn. 34, 161 N. W. 217; *State Mut. Ins. Co. v. Green (Okl.)* 166 Pac. 105; *Gleason v. Prudential Fire Ins. Co.*, 127 Tenn. 8, 151 S. W. 1030.

In *Kelly v. Citizens Mut. Fire Ass'n*, 96 Minn. 477, 105 N. W. 675, the mistake was in the recital as to concurrent insurance permitted. In *Seymour v. German-American Ins. Co.*, 83 N. J. Eq. 37, 90 Atl. 674, the mistake was as to use of the building. In *Fidelity & Casualty Co. v. Palmer*, 91 Conn. 410, 99 Atl. 1052, the mistake was as to the amount of the policy.

It is, of course, essential that to afford a ground for the intervention of equity, the mistake must be mutual, or if the mistake is that of one only there must be fraud or imposition on the part of the other party.

Fidelity Phenix Fire Ins. Co. of New York v. Hilliard, 65 Fla. 443, 62 South. 585; *National Union Fire Ins. Co. v. John Spry Lumber Co.*, 85 N. E. 256, 235 Ill. 98; *National Union Fire Ins. Co. v. Light's Adm'r*, 163 Ky. 169, 173 S. W. 365; *Hayes v. Penn Mut. Life Ins. Co.*, 111 N. E. 168, 222 Mass. 382; *Fidelity & Casualty Co. of New York v. Dierks Lumber & Coal Co.*, 114 S. W. 55, 133 Mo. App. 637. And see *Kenyon Paper Co. v. Nederlandsche Lloyds*, 124 App. Div. 886, 109 N. Y. Supp. 311.

The mistake of the agents of an insurance company, or of their clerk, in putting on a renewal policy the old form of rider, instead of the new form, of which latter form insured did not know, was not imputable to insured, so as to render the mistake mutual, and so permit of reformation for the company after a fire (*O'Neill v. Caledonian Ins. Co. of Edinburgh, Scotland*, 166 Cal. 310, 135 Pac. 1121). So, too, a mistake by which an insurance policy was made payable to the mortgagee and not to his assignee, is not a mutual one warranting reformation (*Salomon v. North British & Mercantile Ins. Co. of New York*, 215 N. Y. 214, 109 N. E. 121, L. R. A. 1917C, 106). But where a written contract of insurance was not the contract made by insured and the general agent of insurer, and insured, though knowing that the policy as written did not accord

with the agreement as made, had the right to rely on the representations made by the general agent, and was led to believe that the misstatement in the policy was merely formal, and could not be taken advantage of by insurer, equity can reform the policy, since insured either acted under an erroneous conviction in accepting the policy containing the terms not agreed on, or he was imposed on, and became a victim of misplaced confidence; the word "mistake" being defined to be either the doing of an act under an erroneous conviction, which act, but for such conviction, would not have been done, or some intentional act or omission or error, arising from ignorance, surprise, imposition, or misplaced confidence (*Sloss-Sheffield Steel & Iron Co. v. Ætna Life Ins. Co.*, 74 N. J. Eq. 635, 70 Atl. 380).

In *Wilson v. Anchor Fire Ins. Co.*, 143 Iowa, 458, 122 N. W. 157, the applicant for insurance on his dwelling and furniture, and the soliciting agent, acted under the mistaken belief that a prior policy on the dwelling had expired. While the agent had the application, the applicant discovered that the prior policy was in force, and notified the agent thereof, but he sent the application to insurer, and it issued a policy. It was held that insurer was not entitled to a reformation of the policy by striking out the part insuring the dwelling on the ground of mutual mistake.

Though generally reformation will not be granted where the defect in the policy is due to a negligent omission and not from mutual mistake (*Lake View Brewing Co. v. Commerce Ins. Co. of Albany*, 143 App. Div. 665, 128 N. Y. Supp. 337), yet, if the negligence is that of the agent of the insurer alone, equity will grant relief.

Dalton v. Milwaukee Mechanics' Ins. Co., 102 N. W. 120, 128 Iowa, 377; *Same v. German Ins. Co. (Iowa)* 102 N. W. 1131; *Same v. Queen Ins. Co., Id.*; *Same v. United States Fire Ins. Co., Id.*; *Same v. Western Assur. Co. of Toronto, Canada, Id.*; *Same v. Western Underwriters' Ass'n of Chicago, Id.*; *Pflester v. Missouri State Life Ins. Co.*, 116 Pac. 245, 85 Kan. 97; *Mississippi Fire Ass'n v. Stein*, 41 South. 66, 88 Miss. 499; *Cowen v. Equitable Life Assur. Soc.*, 84 S. W. 404, 37 Tex. Civ. App. 430.

Insured, in a fire policy expiring noon June 9, 1905, is entitled to have it reformed so as to express the date of expiration as July 1, 1905, covering a loss occurring in the interim, where he had a five-year policy expiring July 1, 1900, and, being solicited for a renewal, received the policy involved, which was dated June 9, 1900, where the agent knew insured supposed he was receiving a five-year policy

taking effect on the expiration of the first policy (*Flickinger v. Farmers' Mut. Fire & Lightning Ins. Ass'n of Story County, Iowa*, 136 Iowa, 258, 113 N. W. 824).

866-867. (h) Same—Mistake as to effect of language

866 (h). A mutual mistake as to the effect of the language employed in the policy whereby it fails to express the intention of the parties will justify reformation.

Phoenix Ins. Co. v. State, 88 S. W. 917, 76 Ark. 180, 6 Ann. Cas. 440; *Dalton v. Milwaukee Mechanics' Ins. Co.*, 102 N. W. 120, 126 Iowa, 377; *Same v. German Ins. Co. (Iowa)* 102 N. W. 1131; *Same v. Queen Ins. Co., Id.*; *Same v. United States Fire Ins. Co., Id.*; *Same v. Western Assur. Co., of Toronto, Canada, Id.*; *Same v. Western Underwriters' Ass'n of Chicago, Id.*; *Dalton v. Agricultural Ins. Co. of Watertown, N. Y. (Iowa)* 102 N. W. 125; *Dalton v. Providence-Washington Ins. Co. of Providence, R. I. (Iowa)* 102 N. W. 126; *McCarl v. Travelers' Ins. Co.*, 151 Iowa, 669, 132 N. W. 12; *Kelly v. Citizens' Mut. Fire Ass'n*, 105 N. W. 675, 96 Minn. 477; *Sloss-Sheffield Steel & Iron Co. v. Aetna Life Ins. Co.*, 74 N. J. Eq. 635, 70 Atl. 380; *Delaware Ins. Co. of Philadelphia v. Hill (Tex. Civ. App.)* 127 S. W. 283. Compare *Kenyon Paper Co. v. Nederlandsche Lloyd*, 124 App. Div. 886, 109 N. Y. Supp. 311.

868-869. (j) Same—Intention to issue policy in accordance with contract

868 (j). Where a contract with a fire insurance agent for a policy provided that the policy should include an agreement permitting additional insurance, but the agent wrote the policy without such provision, insured was entitled to have the policy reformed so as to contain the agreement, and to recover on the policy as reformed (*Palin v. Insurance Co. of North America*, 140 Pac. 886, 92 Kan. 401). In *Britton v. Metropolitan Life Ins. Co. of New York*, 80 S. E. 1072, 165 N. C. 149, Ann. Cas. 1915D, 363, it was held that, where insurer issued a policy providing for semiannual premium payments and in accordance with its custom did not change the policy pursuant to a parol contract between insured and insurer's agent that the premium should be paid quarterly, the insurer was not entitled to have the policy reformed for mistake so as to provide for quarterly payments.

872. (n) Fraud as shown by issuance of policy with variant clause

872 (n). Plaintiff, who took out a policy upon the life of her husband, is entitled to have it reformed so that she would receive
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the proceeds whether her husband lived to the maturity of the policy or not; the issuance of an insurance policy different from that ordered being a constructive fraud (*Ulman v. Equitable Life Assur. Soc. of New York*, 146 N. Y. Supp. 696, 161 App. Div. 708).

872-873. (o) Same—Doctrine as applied to future rights

873 (o). An executory special contract to insure, delivered by an associate general agent of insurer to an applicant for insurance which treats of insurance "15 payment life; 15 year semitontine" and which entitles the applicant to a reserve of a specified sum and a surplus figured at a specified sum, and which states that the reserve is guaranteed and that the surplus is "guaranteed, amount estimated, based on past experience" or which entitles him to a paid-up policy and cash in the sum specified as surplus, with annual dividend during life on the paid-up policy under the options, does not on its face purport, by guaranteeing a fixed amount of surplus, to overthrow the fundamental principle of tontine insurance that a policy holder at the end of his period shall get a cash payment, dependent upon what has happened during the period to associated policy holders, but expresses that his share is to be estimated on such contingencies, and there is no variance between it and a subsequent policy providing for a surplus based on the business of insurer (*Langdon v. Northwestern Mut. Life Ins. Co.*, 92 N. E. 440, 199 N. Y. 188, affirming judgment 115 N. Y. Supp. 1128, 131 App. Div. 922).

875-877. (q) Same—Contrary doctrine

876 (q). Where a policy on an automobile was canceled, and the agent, having no company that would write a similar policy, procured a different policy from another agency, which complainant knew was not authorized to write a policy similar to that canceled, he was not entitled to have the policy written reformed, so as to conform to his agent's agreement to obtain a similar policy (*Mississippi Electric Co. v. Hartford Fire Ins. Co.*, 105 Miss. 767, 63 South. 231).

877-878. (s) Circumstances affecting relative weight of fraud and laches

878 (s). Where a firm applied for workmen's compensation insurance and policy issued was to one member, the failure to notice error was excusable, and retention of policy did not estop the firm to bring suit for reformation (*Komula v. General Accident Fire &*

Life Assur. Corp., Limited, of Perth, Scotland, 165 Wis. 520, 162 N. W. 919). And, insured's failure to examine policy calling for insurance on \$2,500 pay roll, will not bar reformation to accord with agreement with agent for insurance on \$25,000 pay roll (*Fidelity & Casualty Co. v. Palmer*, 91 Conn. 410, 99 Atl. 1052). The carelessness of the insured in not examining insurance policies will not prevent the reformation of the policies by striking therefrom an average clause, thus making the policy a blanket policy (*Carlton Lumber Co. v. Lumber Ins. Co. of New York*, 81 Or. 396, 158 Pac. 807, judgment modified on rehearing 81 Or. 396, 159 Pac. 969).

See, also, as to negligence of insured, *Salmon v. Farm Property Mut. Ins. Ass'n of Iowa*, 168 Iowa, 521, 150 N. W. 680.

Where insured, upon being advised by insurer that his automobile policy did not cover loss by direct collision, nevertheless elected to retain it, he accepted the policy as complying with his application, and could not have it reformed to cover such loss (*Browne v. Commercial Union Assur. Co. of London, England*, 158 Pac. 765, 30 Cal. App. 547).

879-883. (t) Agency

879 (t). Where an agent, authorized to solicit insurance, fails to write into the application, an agreement made with the applicant, as to the terms of the policy, and the company accepts the application, retains the premium paid, and issues the policy, the company cannot successfully defend an action brought by a beneficiary to reform the contract, so as to include the agreement made, notwithstanding a provision in the application that statements, not in writing, shall not bind the company, and that the contract formed by the application and policy taken together can be varied only by the president or secretary of the company, in writing (*Pfiester v. Missouri State Life Ins. Co.*, 116 Pac. 245, 85 Kan. 97).

883-887. (u) Necessity of reformation

884 (u). If a fire policy issued without written application contained conditions inconsistent with the risk, the company is estopped from setting up a breach of such conditions in an action on the policy, and insured may sue thereon without having it reformed (*Northern Assur. Co. of London v. Carpenter*, 52 Ind. App. 432, 94 N. E. 779). So, too, one suing on a fire policy which misdescribes the building in which the property insured was located need not, in order to recover, first secure a reformation of the policy (*Ætna*

Ins. Co. of Hartford, Conn., v. Brannon, 89 S. W. 1057, 99 Tex. 391, 2 L. R. A. [N. S.] 548, 13 Ann. Cas. 1020).

And to the same effect is *De Paola v. National Ins. Co.*, 38 R. I. 126, 94 Atl. 700, and *French v. State Farmers' Mut. Hall Ins. Co.*, 29 N. D. 426, 151 N. W. 7, L. R. A. 1915D, 766.

In *Hearsh v. German Ins. Co.*, 130 Mo. App. 457, 110 S. W. 23, the court went so far as to say that insured may recover, though the policy does not express the actual agreement entered into between the parties, and though the policy is not first reformed.

3. MODIFICATION OF INSURANCE CONTRACTS

900-901. (a) General rule—Meeting of minds

900 (a). An insurance contract may be subsequently modified as to material terms by the parties, after which the rights of the parties are governed by the modified contract.

New York Life Ins. Co. v. Scheuer (Ala.) 73 South. 409; *Gibbs v. Knights of Pythias of Missouri*, 173 Mo. App. 34, 156 S. W. 11; *De Rossett Hat Co. v. London Lancashire Fire Ins. Co.*, 183 S. W. 720, 134 Tenn. 199.

A fraternal beneficiary association issuing a certificate creating no vested interest may contract with a member in advance that the terms of the certificate may be changed, provided the change is reasonable and in harmony with the purpose of the association (*Claudy v. Royal League*, 168 S. W. 593, 259 Mo. 92).

It must be regarded as elementary that, as in every other contract, a modification of an insurance policy is valid and binding only when both parties assent thereto.

Morse v. Fraternal Acc. Ass'n of America, 77 N. E. 491, 190 Mass. 417, 112 Am. St. Rep. 337; *Pearson v. Knight Templars' & Masons' Indemnity Co.*, 89 S. W. 588, 114 Mo. App. 283; *Doscher v. Vanderbilt* (Sup.) 160 N. Y. Supp. 871, judgment reversed 177 App. Div. 813, 164 N. Y. Supp. 264; *Washington Life Ins. Co. v. Lovejoy* (Tex. Civ. App.) 149 S. W. 398.

901-902. (b) What constitutes a modification

901 (b). A letter written by an insurer, not in response to a request from the insured, does not operate as a modification or construction of the insurance contract (*Pringle Bros. v. Philadelphia Casualty Co.*, 138 N. Y. Supp. 330, 153 App. Div. 180). Where an insured exercised his privilege of exchange contained in a five-year renewable term policy, and exchanged it for an ordinary life policy bearing the date of the exchange, the second pol-

icy was not a mere continuation of the first, but created a new contract from its date; since term insurance and the ordinary life policy are essentially different, being based upon different considerations (*Gans v. Ætna Life Ins. Co. of Hartford, Conn.*, 146 N. Y. Supp. 453, 161 App. Div. 250).

Where a rider attached to a life policy provided that, on proof to the company of a total and permanent blindness or deafness of the insured, or permanent incapacity by accident or bodily disorder, in lieu of other benefits under the policy, he should be entitled to either one of two options, but it did not appear that any such proof had been received or accepted by the company, or that either option had been exercised, it was insufficient to show that the terms of the original policy had been changed and the benefits under either of such options had become of force (*Hipp v. Fidelity Mut. Life Ins. Co.*, 57 S. E. 892, 128 Ga. 491, 12 L. R. A. [N. S.] 319).

902. (c) Consideration

902 (c). In *Patterson v. American Ins. Co. of Newark*, 164 Mo. App. 157, 148 S. W. 448, it was held that an oral agreement that the insurer would grant a vacancy permit whenever the premises became vacant, being unsupported by any new consideration, was unenforceable.

Where the insurer in policy, covering a stock of merchandise while located in a designated building, agreed in a writing delivered to insured that the policy should cover the stock while in another building, it could not deny liability on the ground that the writing was not attached to the policy. Such modification is supported by a consideration consisting of the forbearance of insured to demand a cancellation of the policy and a return of the unearned premium (*Texas Nat. Fire Ins. Co. v. White, Blakeney & Fuller Dry Goods Co.* [Tex. Civ. App.] 165 S. W. 118).

903-904. (d) Form of modification

903 (d). It is the general rule that the modification of the insurance contract need not be in writing and consequently a policy insuring a vessel in certain waters could be modified by parol agreement to permit navigation elsewhere (*Norris v. China Traders' Ins. Co.*, 100 Pac. 1025, 52 Wash. 554). So, too, an agreement that the amount of the benefit certificate should be reduced and the assessment based on the real age of the member is valid and binding, though no new certificate was issued or delivered (*Reiter v. National Council of Knights and Ladies of Security*,

154 N. W. 665, 131 Minn. 82). Nevertheless stipulations in written policies of insurance intended to preserve the policy from change by parol, and to make it and such indorsements thereon or additions thereto as may be made in writing a complete repository and memorial of the entire agreement, are valid and for the benefit of both parties and of the community at large (*Atlas Reduction Co. v. New Zealand Ins. Co.*, 138 Fed. 497, 71 C. C. A. 21, 9 L. R. A. [N. S.] 433, affirming [C. C.] 121 Fed. 929).

904-905. (e) Effect of custom or silence

904 (e). Where, at the time a fire policy covering a stock of merchandise was transferred to cover another stock located in a warehouse, the agent of the insurance company knew that the goods in the warehouse were in the original packages and that no inventory could or would be kept, and did not object to the failure to make such an inventory, there was a modification of the original policy in respect to a stipulation for an inventory (*Day v. Home Ins. Co.*, 177 Ala. 600, 58 South. 549, 40 L. R. A. [N. S.] 652).

In *Northwestern Fire & Marine Ins. Co. v. Connecticut Fire Ins. Co.*, 105 Minn. 483, 117 N. W. 825, the facts were as follows: Plaintiff fire insurance company agreed with defendant to cede to it its first surplus for reinsurance, to become binding at 12 o'clock noon of the day on which the report should be mailed defendant, as shown by the postmark. Subsequently the parties at intervals used a binder. On a certain day plaintiff issued a policy of \$10,000, ceded a part to defendant, made entry on its books, and issued a binder, which it did not mail until the following day, and while the property insured was being destroyed by fire. Defendant rejected the risk, but retained the premium sent by the original company as part of a check in settlement of current accounts. It was held that the inference as to modification of the contract was not so certain as to require a reversal of a finding that no modification of the original contract had been made.

905-906. (f) Construction

906 (f). Civ. Code Cal. §. 1647, provides that a contract may be explained with reference to extrinsic circumstances and the subject-matter. Section 1648 provides that a contract extends only to those things concerning which it appears that the parties intended to contract. Section 1651 provides that written parts of a contract control printed parts, and original parts control those copied from a form. An insurance policy covered, in separate

items and for distinct amounts, a building and household furniture, and provided that the entire policy should be void if the building should become vacant or unoccupied. Subsequently the furniture covered by the policy was moved from the insured premises to another house, and the policy was accordingly modified by an attached slip, on which was written "the second item of this policy is hereby made to read and cover as follows." Following the writing, the form printed on the slip was filled out, so as to provide for insurance on household furniture. The form contained a clause permitting vacancy during a change of tenants. It was held in *Alvey v. Continental Ins. Co. of City of New York*, 2 Cal. App. 253, 83 Pac. 285, that the attached slip modified the original policy only so far as it related to the insurance on the furniture, and did not modify the provisions relating to insurance on the house, and there could be no recovery for the destruction of the house by fire while vacant and unoccupied, contrary to the stipulations of the original policy.

906-907. (g) Agency

906 (g). It will be presumed that a general agent has power to modify a contract, especially where the insurer is a foreign company and the modification is for the mutual benefit of the parties (*United Zinc Cos. v. General Accident Assur. Corp., Limited*, 144 Mo. App. 380, 128 S. W. 836). But from the mere fact that one delivered a policy of fire insurance in the execution of which he did not participate, and is not shown to have been authorized to participate, it cannot be inferred that he had authority to modify the contract (*Shackelford & Dickey v. Indemnity Fire Ins. Co.*, 106 N. W. 771, 75 Neb. 680).

The soliciting agent of a life insurance company cannot vary the terms of a policy (*Truly v. Mutual Life Ins. Co. of New York*, 108 Miss. 453, 66 South. 970). A surety company's agent has no implied authority, without receiving an additional premium, to verbally substitute an obligation for an unlimited sum without conditions for a written contract in a limited sum based on specific conditions (*Meegan v. Illinois Surety Co.*, 195 Mo. App. 423, 193 S. W. 899). An agreement between the father of a beneficiary of a life policy and an agent touching payments by father in case of prospective lapse, being beyond the powers of the agent, are not binding upon company, so as to estop it from asserting a subsequent forfeiture (*Barbour v. Equitable Life Assur. Society of United States*, 161 N. Y. Supp. 469, 174 App. Div. 759).

VIII. PREMIUMS AND ASSESSMENTS

2. RIGHT TO AND LIABILITY FOR PREMIUMS IN GENERAL—
INSURANCE OTHER THAN LIFE OR ACCIDENT

913-915. (a) Right of insurer to premiums

913 (a). The consideration for an insurance contract is generally spoken of as a premium, which is payable annually, semiannually, monthly, or weekly (*Commonwealth v. Metropolitan Life Ins. Co.*, 98 Atl. 1072, 254 Pa. 510). Though there is no promise to pay the premium on the delivery of the policy, the obligation to pay the premium is the consideration for the policy on which insurer could sue (*Ginners' Mut. Underwriters of San Angelo, Tex., v. Wiley & House* [Tex. Civ. App.] 147 S. W. 629). And generally, when one accepts and retains a policy of insurance, he is liable for the premium.

Williams v. Hixson, 164 Ill. App. 381; *Westchester Fire Ins. Co. v. Gurian*, 101 N. Y. Supp. 50, 115 App. Div. 610.

Whether the insurer can recover premiums depends on whether insured authorized the issuance of the policy and whether it was thereafter duly issued. *American Fire Ins. Co. of Newark v. Minsker Realty Co.*, 144 N. Y. Supp. 305, 83 Misc. Rep. 1.

If insured gave notice to terminate agent's oral contract to keep renewed a fire policy, after issuance of a new policy, insurer would be entitled to premium. *Struzewski v. Farmers' Fire Ins. Co.*, 179 App. Div. 318, 166 N. Y. Supp. 362.

That the Workmen's Compensation Law was declared unconstitutional after expiration of an insurance policy covering the insured's liability under such law did not relieve the insured from liability for unpaid premiums. *New Amsterdam Casualty Co. v. Olcott*, 165 App. Div. 603, 150 N. Y. Supp. 772.

On the other hand, if no risk attaches, there is no liability for premium. So, where an application for a policy of title insurance to premises described, stipulates that the applicant agrees to pay therefor \$600 "less one-fourth to attorney, exclusive of charges for drawing paper and disbursements for survey and recording, and that, if no survey, policy to be subject to state of facts a survey may show," and that insurer's charges shall be paid, whether the title after examination is accepted or declined, this is an offer to pay \$600, less one-fourth to attorney, for a policy, and there can be

no recovery under that promise without proof of tender of a policy (*Lawyers' Title Ins. & Trust Co. v. Kelly* [Sup.] 132 N. Y. Supp. 721).

914 (a). The discharge of the insurer's liability does not necessarily affect his right to a premium already due. Thus, in an action for premium due on a bond given by defendant to secure deposits of municipal funds, it is no defense that a subsequent agreement was made between the city treasurer and defendant, which may have discharged plaintiff from liability on a bond (*Fidelity & Deposit Co. of Maryland v. Commonwealth Trust Co.*, 119 N. Y. Supp. 598, 65 Misc. Rep. 88). So, too, a surety company is entitled to recover premiums on its bond given for a receiver of an insolvent firm, though the receiver claims to have purchased all outstanding claims against the firm, and to have notified the local attorney and soliciting agent of the surety company, who is also the receiver's counsel, that he had done so, and to have received an assurance that he need not comply with the terms of his contract with the surety (*American Surety Co. of New York v. Musselman*, 90 Neb. 58, 132 N. W. 729).

But, of course, a termination of the risk under the terms of the policy releases the insured from liability for future premiums. In *American Surety Co. v. Empson*, 39 Colo. 445, 89 Pac. 967, the defendant contracted with a third person to thresh peas for the season of 1897, and agreed to protect him from liability incurred by the use of a particular machine as an infringement of a patent. A surety company executed a bond conditioned on defendant's performance of his agreement. The bond stipulated that defendant should pay in advance to the company, on a specified date, a specified premium every year, "for continuing the bond from year to year at the request of" defendant, until the company should be discharged; the words quoted being written into the printed form. It was held that the bond obligated the company to indemnify the third person against only such liability as he might incur by the use of a particular machine during the season of 1897, and the company was not entitled to premiums after the expiration of that year, in the absence of defendant requesting that the bond be continued. In *Ætna Indemnity Co. v. Ryan*, 53 Misc. Rep. 614, 103 N. Y. Supp. 756, the facts were these: A bond securing the work of a municipal contractor provided for a premium to be paid annually, and that the life of the bond should be the interval between the date of the bond and the date of the completion and acceptance of the work;

the contractor agreeing to give notice in writing to the surety company of such completion and acceptance. The contract required the contractor to warrant and maintain all roofing, gutters, etc., for 12 months after completion of the building. It was held that plaintiff's liability on the bond terminated one year after such completion, though defendant gave no notice thereof, and hence that plaintiff was only entitled to recover premiums up to that date. On death of principal an executor's bond furnished by a surety company can earn no further premiums (*American Surety Co. of New York v. Cabell* [Okl.] 159 Pac. 352).

Where a life policy required payment of premiums, the petition for recovery on policy must aver payment in order to be good. *Life Ins. Co. of Virginia v. Proctor*, 89 S. E. 1088, 18 Ga. App. 517.

A fidelity bond, reciting that it was in consideration of stipulated premium, though not a sealed instrument, imported a consideration, and general allegation in petition that, in consideration of premium paid, defendant executed bond, was not subject to special demurrer. *National Surety Co. v. Farmers' State Bank of Sparks*, 89 S. E. 581, 145 Ga. 461.

915-917. (b) Rights of agents, brokers, etc.

915 (b). An insurance agent may give credit for premiums to the broker negotiating for the policy rather than to the insured, whose agent the broker was (*Leader Realty Co. v. Markham*, 163 Mo. App. 314, 143 S. W. 1104).

917-919. (c) Persons liable for premiums

917 (c). A broker who procures insurance is not liable for a premium on a policy procured by him for another, unless he acts under a *del credere* commission, and this rule applies to marine insurance, unless abrogated by usage (*Harrison v. Birrell*, 58 Or. 410, 115 Pac. 141).

918 (c). In *Willis Cab & Auto Co. v. General Accident, Fire & Life Assur. Corp. of Perth, Scotland*, 136 N. Y. Supp. 100, it was held that where a motor company took out a policy in which plaintiff, owner of automobiles, was named as the insured as respects indemnity for losses imposed by law, but claims for damages to automobiles were payable to the motor company, the insurance company, in an action by plaintiff on the policy to recover indemnity, could not counterclaim for premiums due on the policy, in the absence of a showing that plaintiff agreed either expressly or impliedly to pay, and the fact that plaintiff made claims for damages

under the policy was not inconsistent with the view that the motor service company was the party who agreed to pay the premium.

The clause, "Provided that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee shall, on demand, pay the same," being a part of the mortgagee clause of the New York Standard policy, is a condition and not a covenant, and hence the mortgagee was not liable for the premiums (*Coykendall v. Blackmer*, 146 N. Y. Supp. 631, 161 App. Div. 11). So it is held in Rhode Island that a mortgage clause making policy payable to mortgagee, as its interest may appear, provided that, if mortgagor fails to pay premiums, the mortgagee shall pay them, is not an absolute agreement on mortgagee's part to pay the premiums, but merely makes such payment a condition to its recovery on policy (*Home Ins. Co. v. Union Trust Co.* [R. I.] 100 Atl. 1010, L. R. A. 1917F, 375).

919 (c). Defendant is not liable for premium for increasing amount of a policy, in accordance with a letter signed "M. J.," his name; the evidence being that that was also the name of his uncle, who owned the property, and that the letter was written by defendant's bookkeeper, without his authority, at request of the uncle (*Schroeder v. Jarmulowsky* [Sup.] 139 N. Y. Supp. 45).

A mere building superintendent, not ordering an "owner's indemnity policy" assuring against damages under the Workmen's Compensation Act, nor in any way giving his consent to becoming a party thereto, is not liable for premium thereon (*Standard Acc. Ins. Co. of Detroit, Mich., v. Fischel* [Sup.] 163 N. Y. Supp. 92). Where attorneys by signing a contract became liable to a title insurance company for its fees, they could escape liability only by showing that title was capriciously rejected, that policy was subjected to unreasonable exceptions, or that charges were unreasonable (*Title Guarantee & Trust Co. v. Maloney* [Sup.] 165 N. Y. Supp. 280).

919-921. (d) Amount of premium

920 (d). In *Illinois Surety Co. v. Hildebrand* (Sup.) 126 N. Y. Supp. 651, it appeared that the defendant signed an agreement to pay premiums of a bond given by the plaintiff as surety for the performance of a contract made by the defendant with the city: "One thousand (\$1,000) and five hundred (\$500) dollars annually thereafter (\$1,000) per annum in advance." The agreement further provided that if the contract ran over one year the premium should be

prorated at the rate of \$500 per annum. It was held that defendant's liability was to pay \$1,000 on the execution of the bond, and that there was no further liability for premiums until the contract with the city had run for one year, and that further premiums were to be paid at the end of each subsequent year at the rate of \$500, or at the termination of defendant's contract with the city before the end of a yearly period the premium was to be prorated at the rate of \$500 per year for such part of the year as the contract should have continued.

921-922. (c) Same—Employer's liability insurance

921 (c). The premium to be paid on an employer's liability policy is usually based on the compensation paid by the insured to his employes. The insured may be required to pay a premium based on the entire pay roll (*Frankfort Marine Accident & Plate Glass Ins. Co. v. California Artistic Metal & Wire Co.*, 28 Cal. App. 74, 151 Pac. 176). If the policy provides that the premium is based upon the entire compensation paid the employes, and that if such entire compensation exceeds the estimate the assured shall, upon demand, immediately pay the insurer the additional premium earned, the insured is liable for the additional premium, upon demand, where the compensation has been grossly underestimated in the schedule (*New Amsterdam Casualty Co. v. Hetterstrom*, 197 Ill. App. 452). So, where the policy provided that the premium placed therein was estimated upon data in the schedule and that the premium would be subject to further adjustment if the compensation paid employes was greater or less than the estimated amount the insurer could recover any additional amount shown to be due (*Fidelity & Casualty Co. of New York v. J. W. Crowdus Drug Co.* [Tex. Civ. App.] 166 S. W. 1186). The failure of assured under an employer's liability policy to include the salaries of its manager and bookkeeper in reports to the insurer of compensation paid does not entitle the insurer to recover premiums based thereon (*Fidelity & Casualty Co. v. Tyler Cotton Oil Co.* [Tex. Civ. App.] 184 S. W. 304). If the policy is canceled by insured after three months, the earned premium was properly computed on the basis of the compensation which would have been paid to employes for the entire year, estimated on the basis of that paid for the three months (*Big Run Coal Co. v. Employers' Indemnity Co.*, 163 Ky. 596, 174 S. W. 25).

To protect the rights of the insurer and enable it to make a proper adjustment of premiums, the company is generally given the right to examine the books of the assured so far as they relate to the compensation paid to his employes. So it was held in *United States Casualty Co. v. Charleston, S. C., Min. & Mfg. Co.* (C. C.) 183 Fed. 238, that in order to determine the amount of premium the insurer had a right to audit defendant's books, pay rolls, and like documents. But, where the right is thus given, the insurer must limit its demand to examine the books to reasonable hours and on reasonable days, and it may not rightfully demand to examine the books on Sundays or after business hours at night or when insured uses the books (*Palmer & Hardin v. Fidelity & Casualty Co.*, 137 Ky. 139, 125 S. W. 270). And in the same case it was held that a petition by insurer for an examination of insured's books, which merely alleges that it has repeatedly requested insured for permission to examine its books, and which does not allege that insured is indebted to insurer in any sum, and which does not aver that the settlement had at the end of the term of the policy was procured by fraud or mistake as to the amount of wages paid, does not show a right to examine the books given by the policy stipulating that insurer shall have the right at all reasonable times to examine insured's books.

922 (e). The schedule on which the premium is computed will ordinarily be held to include all employes properly engaged in the work of the business (*Empire State Surety Co. of New York v. Moran Bros. Co.*, 71 Wash. 171, 127 Pac. 1104). So, where an accident policy issued by plaintiff covering the drivers of vehicles of defendant transfer company provided that the premium was based on the entire compensation earned by the drivers, and that, if it should exceed the sum set forth in the schedule furnished, defendant should pay the additional premium earned, plaintiff was entitled to a premium based on the entire compensation paid the drivers, though part of the time they were employed as stablemen (*Palmer Transfer Co. v. Fidelity Casualty Co.*, 133 Ky. 547, 118 S. W. 370). And where policies were issued to defendant, insuring it against liability for injuries to its employes in certain designated premises, and defendant leased other adjacent premises, which it occupied in connection therewith as executive offices, the entrance being through the original premises, the street numbers of which were still claimed by defendant as its address, the new premises were

only an addition to the old, and were covered by the policies, so as to render defendant liable for the premiums based on the amount of wages of employes thereon (*Ætna Life Ins. Co. v. Du Parquet, Huot & Moneuse Co.*, 120 N. Y. Supp. 759, 65 Misc. Rep. 551, judgment modified on rehearing [Sup.] 122 N. Y. Supp. 688).

In *New Amsterdam Casualty Co. v. Mesker*, 128 Mo. App. 183, 106 S. W. 561, the policy insured the employer against liability for personal injuries to any employe in and during the operation of the trade or business described in the schedule, and stipulated that the premium to be paid was based on the compensation to employes. The schedules contained, under the head of "Trade or Kind of Business," "galvanized iron cornice and wrought iron work, including drivers." It was held that the insurance company was entitled to premiums computed on the wages, not alone of employes who worked directly on cornices or wrought iron work and drivers, but also on the wages of workers on skylights, tinnern, carpenters, shippers, machinists, engineers, and night watchmen. And in the same case it was held that, where the schedule in other policies indemnifying the employer against losses for personal injuries to employes on outside work contained, under the head of "Kind of Business," "galvanized iron and sheet iron workers, wrought iron work, erecting," the wages for tinnern's work done outside were within the schedule, entitling the insurance company to have them included in the basis for computation of the premiums on the policies. In *United States Casualty Co. v. Charleston, S. C., Min. & Mfg. Co. (C. C.)* 183 Fed. 238, the facts were these: Defendant during a number of years carried employers' liability policies, issued by plaintiff, the premiums on which were based on the amount of the pay roll of the employes covered by the policies, estimated in the first instance, and to be adjusted at the end of the terms on reports by defendant showing the actual amount paid. The negotiations were between defendant and an agent of complainant who took the applications and delivered the policies and with whom settlements of the premiums were made. Twenty-eight of the 30 policies issued covered all of the employes of defendant, including the executive officers and office men. It was held that, as complainant had no knowledge at the time the several settlements were made that the reports made by defendant did not include the salaries paid to the executive officers and office men, it did not, by accepting the premiums based on such reports, waive its right to recover the remainder of premiums to which it was entitled.

Where the premium on an employer's liability indemnity policy covering a sawmill company and a railway company was based on the pay roll of employes engaged in particular occupations, in computing the premium, the pay roll of the railway company could not be included if none of the employes thereon were engaged in such occupations. And where the schedule included employes engaged in logging operations and in construction and extension work, in computing the premium, amounts paid the employes in the company's hotel business and in salaries to its executive officers were properly excluded (*New Amsterdam Casualty Co. v. Union Sawmill Co.*, 95 Ark. 140, 128 S. W. 861). In *Gilbane v. Fidelity & Casualty Co.*, 163 Fed. 673, 90 C. C. A. 265, it was held that, where assured under an employer's liability policy agreed to furnish the insurer correct statements of the amount of wages paid to employes as a basis for the adjustment of premiums, the insurer could recover additional premiums where assured understated such wages, though insurer is unable to prove with certainty the amount of such payments because of the manner in which defendant kept its books, since the court may approximate the amounts.

On cancellation of the policy by assured the rate is governed by a clause providing for a short term rate if cancellation of the policy was at the request of the assured, and not by a special agreement for a lower rate, if the assured concluded at the end of the first year to carry no liability insurance (*Ætna Life Ins. Co. v. Kansas City Electric Light Co.*, 184 Mo. App. 718, 171 S. W. 580). Where an employer's liability policy provided a special rate of premium on discontinuance where the insured goes out of business, those jointly insured are not entitled to such premium where the policy is canceled at their request, only one of them going out of business (*Ocean Accident & Guarantee Corp., Limited, of London, Eng., v. Combined Locks Paper Co.*, 162 Wis. 255, 156 N. W. 156).

In an action for premiums under policies insuring defendant against liability for bodily injuries sustained by employes while in its employ, where each policy provided that the amount of such premium should be a percentage of the amounts paid by defendant for wages to be computed from correct reports of such amounts furnished by defendant, evidence of the average number of men employed by defendant during the period for which premiums were sought to be recovered and its pay rolls for such time was properly excluded. *Employers' Liability Assur. Corp. of London, England, v. Kelly-Atkinson Const. Co.*, 195 Ill. App. 620.

922-924. (f) Payment of premium in general

922 (f). Ordinarily premiums are payable in advance and where the insured in an indemnity policy paid the first premium about the time the policy was issued, the annual premiums will be regarded as payable in advance, though there is no express provision of the contract to that effect (*Illinois Surety Co. v. Paoli*, 121 N. Y. Supp. 340, 66 Misc. Rep. 160).

923 (f). Though tender of payment by check is not ordinarily good, yet, if the course of dealing between the insurer and insured has been to receive payment by check the insurer would be estopped to say that a payment by check was not a sufficient compliance with the policy (*Continental Ins. Co. of New York v. Hargrove*, 131 Ky. 837, 116 S. W. 256). And in the same case it was held that, where the place of payment of the premium is designated in the policy, mailing a check is not payment of the premium until it is received.

Payment of premiums to a general agent of an insurance company by a note and a check binds the company. *Morris & Co. v. Rhode Island Ins. Co. of Providence*, 181 Ill. App. 500.

An arrangement by the agent for an insurance company, who was also cashier of a bank, that the premium should be charged against insured's account at the bank, does not invalidate the policy. *Lea & Adcock v. Atlantic Fire Ins. Co.*, 168 N. C. 478, 84 S. E. 813.

924 (f). In determining whether, under the terms of the policy, credit may be extended for the premium, the conduct of the parties as a practical construction of the policy may be considered (*Raulet v. Northwestern Nat. Ins. Co. of Milwaukee*, 157 Cal. 213, 107 Pac. 292).

Where full amount of premium was deducted from amount awarded insured, including the premium due on a warehouse which was not destroyed, insured had a paid-up policy on warehouse, for time covered by premium. *Merchants' & Bankers' Fire Underwriters v. Brooks* (Tex. Civ. App.) 188 S. W. 243.

Though the complaint on a policy alleges that it was issued "in consideration of the stipulations herein and \$24 premium," evidence that credit was given does not amount to a variance, as the recital in the policy may be construed as a promise to pay the premium (*Raulet v. Northwestern Nat. Ins. Co. of Milwaukee*, 157 Cal. 213, 107 Pac. 292).

924-926. (g) Persons to whom payment may be made

924 (g). Payment of the premium to the insurer's agent, who has authority to issue policies and collect premiums, is in effect

payment to the company. Thus, in *Buckley v. Citizens' Ins. Co. of Missouri*, 188 N. Y. 399, 81 N. E. 165, 13 L. R. A. (N. S.) 889, reversing 112 App. Div. 451, 98 N. Y. Supp. 622, the insured gave to the agent a note for the premium thereof and for premiums for other policies issued at the same time on the same property and for premiums on policies on other property. The agent gave credit for the payment of the premium, discounted the note at a bank, and received the proceeds thereof. The insurer charged the premium to the agent, who thereafter paid the same. The insurer on the return to it of the policy credited the agent with the amount of the unearned premium. It was held that, as between the insured and the insurer, the premium was paid at the time credit was given by the agent.

A payment to a local agent is binding on the insurance company, where the agent has authority to collect the first year's premium and accept payment of same partly in cash and partly by note and no objection is made on that ground by the company. *Rankin v. Northern Assur. Co.*, 98 Neb. 172, 152 N. W. 324.

925 (g). Where an ordinary insurance broker places insurance for his client, and the company insuring delivers the policy to the broker, and the broker delivers it to his client, who pays to him the premium, the payment to the broker is payment to the company (*Gosch v. Firemen's Ins. Co.*, 33 Pa. Super. Ct. 496). And so, too, payment of premiums to a broker acting as agent for insurance agents is a payment to the agents (*Leader Realty Co. v. Markham*, 143 S. W. 1104, 163 Mo. App. 314). An insurance company that delivers its policy through brokers to whom insured pays the premium is liable, though it does not receive the premium paid, where it clothed such brokers with apparent authority to receive the premium (*National Hotel Co. v. Merchants' Fire Assur. Corp. of New York*, 183 Ill. App. 71). And, too, payment of insurance premium to an attorney employed by a broker for collection thereof is payment to the insurance company, where such employment was ratified by the company after claim was put in attorney's hands (*Whitlock v. Greenberg* [Sup.] 159 N. Y. Supp. 184).

Whether certain attorneys had authority to receive payment of a premium note executed by plaintiff is for the jury. *Stubblefield v. Planters' Fire Ins. Co.*, 105 Ark. 697, 150 S. W. 120.

926-929. (h) Notes for premiums and liability thereon

926 (h). In view of the general principle that, if the risk attaches a note given for the premium becomes a binding obligation,

it has been held that where an application for insurance stipulated the company should be bound on receipt and approval of the application by the general agents of a named city, and the application was approved and the policy issued, but not received by insured for several weeks, the maker of the premium note was liable, without regard to the delay (*Van Arsdale-Osborne Brokerage Co. v. Robertson*, 36 Okl. 123, 128 Pac. 107). Where an application to change an insurance policy and a note for the premium was subject to the insurer's acceptance, and before acceptance defendant countermanded the application, there was no liability on the note (*Planters' Fire Ins. Co. v. Crockett*, 115 Ark. 606, 170 S. W. 1012). If the policy was issued for indivisible period of five years, for certain indivisible premium, that is, \$15 and a premium note for \$60, the note was as much a part of the consideration for insurance as the cash, so that it could not be claimed that there was no consideration for the note (*Continental Ins. Co. of New York v. Phipps* [Mo. App.] 190 S. W. 994). But a note given for premium on a policy of hail insurance on wheat is void for want of consideration if the wheat was destroyed before the policy was issued (*Van Arsdale-Osbourne Brokerage Co. v. Patterson* [Okl.] 154 Pac. 1131).

The act of the insured, upon transferring the property, in tendering back for cancellation the five-year policy, the first premium on which they had paid, and given their note for the four remaining installments, the first installment being more than the short rate for the time the policy had been in force, will end their liability on the premium note (*Continental Ins. Co. v. Smith*, 61 Ind. App. 401, 112 N. E. 15). Under a term policy for five years, whereby the whole premium was earned unless the policy was canceled in accordance with its provisions, insured was not entitled to reduction of his premium note on his failure to comply with the contract, and after default insurer was entitled to recover full amount of note (*Continental Ins. Co. of New York v. Phipps* [Mo. App.] 190 S. W. 994).

Under Code Iowa, § 4617, touching the construction of contracts, note given for a policy of term insurance is open to the construction that a particular clause meant that, in case of loss, subsequent installments should not become due and payable and should be void. *Houge v. St. Paul Fire & Marine Ins. Co.* (Iowa) 156 N. W. 862.

927 (h). Under the Mississippi statute (Acts 1898, pp. 18-30, c. 5), declaring null and void contracts with one who has not paid his privilege tax, a premium note executed for insurance, drawn by

insured payable to his own order, and indorsed by him and delivered to the soliciting agent, who had not paid his privilege tax, and by the latter transferred to the plaintiffs, the general agents of the insurance company, who took the same, individually remitting the premium to the company, was void (*White v. Post & Bowles*, 91 Miss. 685, 45 South. 366).

929 (h). Where the maker of a premium note sought to recover over against the payee, an insurance agent, for the latter's failure to pay the premium, the burden was on him not only to allege and prove that the policy was not in force, but that the insurer had made no arrangement to waive the provision requiring payment in cash (*Newman v. Norris Implement Co.* [Tex. Civ. App.] 147 S. W. 725).

An applicant who gave notes for first year's premiums, is estopped, by failure to take active steps to rescind and by retaining policies, to claim that notes were obtained by fraudulent representations of soliciting agent. *Northern Assur. Co. v. Meyer*, 194 Mich. 371, 160 N. W. 617.

934-936. (o) Actions for premiums

934 (o). An action on an indemnity insurance policy stipulating for the payment of additional premium, based on the pay roll of insured for the policy term, for additional premium, is an action for a specific sum alleged to be due under a contract, and is not a suit for an accounting, and whether any sum is due depends on the amount which insured paid to employes in specified work during the term of the policy (*Pacific Coast Casualty Co. v. Home Telephone & Telegraph Co.*, 106 Pac. 262, 11 Cal. App. 712).

Under Sess. Laws 1911, c. 49, § 33, where insurance was written at less than the scheduled rate, an action would not lie to recover the difference in the premium; the contract not being void, and there being therefore no implied contract to pay the scheduled rate. *Way v. Pacific Lumber & Timber Co.*, 133 Pac. 595, 74 Wash. 332, 49 L. R. A. (N. S.) 147.

If an agent is charged with, or is liable to the company for, the premium, or has paid it, he may sue therefor in his own name. Thus, when an insurance company looks to its agent for the premiums on insurance written by him, the agent being the owner of the debt arising by his extending credit for the premiums, and, on payment thereof, being subrogated to all the rights of his principal in the premiums, he is entitled to sue therefor, and no assignment thereof is necessary to enable him to recover; but, if an agent has

no right by subrogation or assignment, he is not entitled to bring the action (*Harrison v. Birrell*, 58 Or. 410, 115 Pac. 141). The solicitor of the insurance company who placed the insurance cannot maintain an action in his own name against the insured for the amount of the premium (*Raffety v. Romer*, 122 Ill. App. 57). And insurance brokers, who, though acting as agents for foreign insurance companies in placing the insurance in question, had no interest in the premiums payable to the insurers, were not entitled to maintain an action in their own name therefor (*Cortis v. Van Derveer* [Sup.] 91 N. Y. Supp. 743).

It is no defense to an action for premiums that the agent made oral representations that the premium would not be collected where the policy, accepted by the insured, expressly provided that no condition or provision could be altered, except by the written consent of the president or secretary (*Fidelity & Casualty Co. of New York v. Fresno Flume & Irrigation Co.*, 161 Cal. 466, 119 Pac. 646). In an action for a premium due on a surety bond, the discharge of the surety through a change in the contract was available as a defense, though the principals in the bond had failed to notify the surety of its discharge (*Poe v. Cameron*, 153 N. W. 129, 130 Minn. 15). Where a mining company insured against loss for damages on account of injuries to employés for one year paid the premium for six months, it could not avoid liability for the balance of the premium by taking out other insurance covering a part of the same period, though accidents had occurred resulting in injuries to employés on account of which insured had received indemnity under the other insurance, and the insurer under the previous policy did not pay any indemnity for such injuries, in the absence of allegation or proof that notice of any accident or losses had been given to the insurer under the former policy or of any claim of breach of the contract (*Ætna Life Ins. Co. v. S. H. & S. Min. Co.*, 115 Pac. 540, 84 Kan. 826). A recovery of earned premiums for liability insurance cannot be defeated on the ground of insurer's fraud in inserting matter in the policies, without showing that defendant was deceived or misled (*Fidelity & Casualty Co. of New York v. Dierks Lumber & Coal Co.*, 114 S. W. 55, 133 Mo. App. 637). And in the same case it was held that in a suit for earned annual premiums for liability insurance, under policies requiring insured to pay a percentage on the wages paid specified classes of employés, injuries to whom the policies insured against, insured was barred by laches to assert fraud or mistake in the inclusion, in the renewal policies,

of an additional class of employes, where the last policy had expired 20 months previously, regardless of the incurrence of liability under the policies.

In *United States Casualty Co. v. Charleston, S. C., Min. & Mfg. Co.* (C. C.) 183 Fed. 238, it appeared that by the terms of employer's liability insurance policies issued by complainant to the defendant, the premiums were to be computed on the actual pay rolls of defendant during the terms of the policies, including thereon all employes covered by the policies, and it was made the duty of defendant at the end of each term to make a report showing the amount of such pay rolls. The reports so made did not include the salaries paid to certain classes of employes covered by the policies, but complainant was ignorant of such fact, and, accepting the reports as correct, made settlements thereon. After the policies had all expired, it accidentally discovered such omissions, and within a reasonable time thereafter brought suit to recover the additional amount of premiums to which it was entitled. It was held that complainant was not barred by laches from maintaining the suit on the ground that in the meantime defendant had destroyed its original pay rolls, since it was its duty to make correct and complete reports, and, not having done so, to preserve the evidence the destruction of which was at its peril, and especially as it further appeared that it had summaries showing the totals of each week's pay rolls.

Where the note executed to the general agents of an insurance company in payment of premium on a hail policy contained a mortgage giving the payees a lien on the crop to secure the note, and provided in case of loss that the debt should at once become due and be deducted from the loss, the insured, in an action on the note, could set off against it any loss under the policy (*Van Arsdale-Osborne Brokerage Co. v. Martin*, 106 Pac. 42, 81 Kan. 499). But where agents for a hail insurance company advanced the premium on a policy, and insured executed a note to them, reciting that it was in payment of the premium, and containing a mortgage providing that, in the event of loss under the policy, the debt secured by the mortgage should at once become due and be deducted from such loss, the provision that, in the event of loss under the policy, the debt secured should be deducted therefrom, did not confer upon insured the right to set off against the note any loss under the policy (*Van Arsdale v. Edwards*, 24 Okl. 41, 101 Pac. 1123).

935 (o). A petition to recover the premium on a builder's bond, alleging that defendants were "due" the surety company a certain sum as the premium to be paid under the terms of the contract on a specified date, and that defendants had become "indebted" to the surety company for such premium, with interest thereon from the time that it became "due," was sufficient as against a general demurrer to set forth a liability by defendants for the premium, without an allegation that the surety company had not been discharged or released from liability as surety on the bond (*Oliver v. Ætna Indemnity Co.*, 65 S. E. 116, 132 Ga. 819). Where, in an action by an insurance company on a premium note, the defense was that the note had been fully satisfied by a cancellation of the policy, a contention by defendant that a provision in the policy that, in case of a cancellation thereof, the customary rate for insuring such property for a period of one year should be taken as the basis of rebate, was unreasonable, was not within the issues (*Home Ins. Co. v. Hamilton*, 128 S. W. 273, 143 Mo. App. 237). In an action to recover premiums under a liability insurance policy, an answer setting up a counterclaim for insurance for injuries to plaintiff's employés is subject to demurrer, where it does not set out the insurance contract, nor facts from which the court may infer that such a contract was entered into (*Ætna Life Ins. Co. v. North Star Mines Co.*, 107 N. Y. Supp. 140, 56 Misc. Rep. 164).

Where an application for hail insurance provides that the company shall not be bound until the application is approved at the home office, in a suit on a note given for such insurance, the holder must show such approval and acceptance, or acts tantamount thereto in order to recover (*Van Arsdale & Osborne v. Young*, 21 Okl. 151, 95 Pac. 778). And in the same case it was held that the defense of no consideration places the burden on the defendant to show that he had received no policy or any notice that the application had been approved.

The sufficiency of the evidence was considered in *Allen v. Smith*, 39 South. 615, 145 Ala. 657; *American Surety Co. of New York v. Musselman*, 90 Neb. 58, 132 N. W. 729; *Fidelity & Casualty Co. v. Fischer* (Sup.) 101 N. Y. Supp. 545; *Globe & Rutgers Fire Ins. Co. v. Robbins & Myers Co.*, 96 N. Y. Supp. 378, 109 App. Div. 530.

936 (o). In an action on a note executed by defendant to an insurance company for the first premium, where there was evidence supporting plaintiff's theory that the negotiations for the insurance were merged into a completed and executed written contract of in-

insurance enforceable against the company, a requested instruction by defendant requiring a verdict for defendant if there was at the beginning of the negotiations an oral agreement by the insurance company's agent that the note sued on need not be paid unless defendant finally concluded to accept the policy was properly refused (*Creditors' Union v. Lundy*, 16 Cal. App. 567, 117 Pac. 624).

Where, in an action on a premium note given to an insurance agent, there was evidence that the policy was in force at the time of the trial, that the agent had actually paid the premium for which the note was given after suit brought, and that the insurer had waived the provision in the policy that it should not be in force until the first premium had been paid in cash, the maker was not entitled to judgment over against the agent, on judgment being rendered against him in favor of the indorsee, on the ground that, because of the agent's failure to pay the premium in cash to the company before suit brought, the note was without consideration as between the parties (*Newman v. Norris Implement Co.* [Tex. Civ. App.] 147 S. W. 725).

3. RIGHTS AND LIABILITIES INCIDENT TO PREMIUM OR DEPOSIT NOTES AND ASSESSMENTS THEREON—MUTUAL INSURANCE

937-938. (b) Statutory provisions—What law governs

938 (b). Generally the liability of policy holders in a mutual assessment insurance company depends upon the law of the state creating the corporation (*Swing v. Taylor & Crate*, 68 W. Va. 621, 70 S. E. 373). So a capital stock note, given to a mutual fire insurance company, executed in New York and made payable therein, is a New York contract, and its validity should be determined by the laws of that state. Therefore a maker of a capital stock note, given to secure called assessments, may not, after receiving the benefits of the insurance, resist liability on the note on the ground of fraud or want of consideration; the New York law, by which the note was governed, requiring that, where one of two persons must suffer by the fraud of a third person, the loss should fall on him who first gave the credit (*Equitable Mut. Fire Ins. Corp.'s Receiver v. Murray*, 131 Ky. 740, 115 S. W. 816).

938-943. (c) Liability of insured in general

938 (c). A member of a mutual fire insurance company is liable to assessments while his policy remains in force and is chargeable

with his pro rata share of all liabilities justly attaching during the existence of the policy.

Nichol v. Murphy, 145 Mich. 424, 108 N. W. 704; *McTindall v. Piedmont Mut. Ins. Co.*, 81 S. C. 240, 62 S. E. 213; *Burke v. Scheer*, 89 Neb. 80, 130 N. W. 962, 33 L. R. A. (N. S.) 1057.

Members of an unincorporated insurance association, the losses of which are paid from deposits made by the members, but the policies of which provide that the members agree to pay any loss in the proportion that the amount of their deposits bears to the total deposits, are liable upon such policies in that proportion; such plan being different from Lloyd's insurance. *Sergeant v. Goldsmith Dry Goods Co.* (Tex. Civ. App.) 159 S. W. 1036.

The provision of Insurance Law (Laws 1892, p. 2032, c. 690) § 267, as amended, that a person insured in a county co-operative insurance company shall give his undertaking to pay to the company his pro rata share of losses to members thereof, etc., is for the protection of the company, and may be waived by it without losing its right to enforce the obligation. *Skaneateles Paper Co. v. American Underwriters' Fire Ins. of Monroe County*, 114 N. Y. Supp. 200, 61 Misc. Rep. 457.

And generally, having paid one assessment based on his pro rata share of the loss, he is immune from further assessment to pay that loss (*McTindall v. Piedmont Mut. Ins. Co.*, 81 S. C. 240, 62 S. E. 213).

A member of a mutual fire association who paid extra premium for guaranty of nonliability for assessments is not liable to be assessed by the receiver. *Wetmore v. McElroy*, 80 S. E. 206, 96 S. C. 182, Ann. Cas. 1916B, 79 (by divided court).

The condition under which the insured becomes liable and the amount of his liability may be fixed by statute.

Farmers' United Tp. Mut. Hall Ass'n v. Dally, 98 Minn. 13, 107 N. W. 555; *Burke v. Scheer*, 89 Neb. 80, 130 N. W. 962, 33 L. R. A. (N. S.) 1057.

It is, of course, essential that the policy is a valid policy in order to subject the insured to liability for assessment (*Skaneateles Paper Co. v. American Underwriters' Fire Ins. Co.*, 61 Misc. Rep. 457, 114 N. Y. Supp. 200).

940 (c). Mutual insurance companies may under some conditions issue policies for a fixed sum without liability for further assessment; but this, of course, depends on statute. Thus it is held that under the New York Insurance Law (Laws 1892, c. 690), companies organized under sections 110 to 137 of that law may issue

such policies, while town and county co-operative companies organized under sections 260 to 279 have no such right (*Skaneateles Paper Co. v. American Underwriters' Fire Ins. Co.*, 61 Misc. Rep. 457, 114 N. Y. Supp. 200).

942 (c). The insolvency of the company does not release the insured from liability to assessment for losses occurring prior thereto (*Nichol v. Murphy*, 145 Mich. 424, 108 N. W. 704). So, too, where an insurance company sells its business and assets and goes out of business, premium notes given for its policies are conditional obligations of the makers (*Crowell v. Northwestern Nat. Life Ins. Co.*, 108 N. W. 962, 99 Minn. 214).

That mutual fire insurance company became insolvent did not relieve policy holder of liability on premium note notwithstanding Act April 24, 1905 (Laws 1905, § 489), requiring bond from such companies conditioned for payment of losses. *House v. Slegle*, 121 Ark. 236, 180 S. W. 747.

945-949. (f) Grounds of assessment

945 (f). Generally a mutual company cannot levy assessments to pay anticipated losses, unless authority so to do is given by statute. Thus it has been held in Nebraska that mutual companies cannot make assessments on their members, as provided by Acts 1891, p. 276, c. 33, § 12, until loss has first occurred, unless such assessment is authorized by a two-thirds vote of its directors (*Wolcott v. State Farmers Mut. Ins. Co.*, 77 Neb. 742, 110 N. W. 628, rehearing denied 77 Neb. 746, 112 N. W. 371). However, in *State v. Ohio Fire Ins. Ass'n*, 27 Ohio Civ. Ct. R. 838, it was held that under the Ohio Statute (Rev. St. § 3686), providing that the members may assess and collect from each other such sums from time to time as may be necessary to pay losses, which occur by fire to any member of the association, and the assessment and collection of such sums shall be regulated by the constitution and by-laws of the association, such association may collect from its members sums in advance of any loss being sustained, and assessment made therefor, whether done directly by the company or through a trustee, is authorized.

946 (f). While the primary object is to raise funds for the payment of losses, an assessment may include, or may be made to cover, a reasonable amount for expenses. Thus a company may make an assessment to obtain money to pay the license tax imposed by law (*Iowa Mut. Tornado Ins. Ass'n v. Gilbertson*, 129 Iowa, 658, 106 N. W. 153). The Insurance Law of New York

(Laws 1892, c. 690, § 268, as amended by Laws 1897, c. 29) authorizes directors of a county co-operative insurance company to borrow money to pay a loss and to make an estimate of the sum necessary to pay losses and expenses for the current year and supply any deficiency in the preceding year, and assess the amount at such times as would be most advantageous to the company. It was held in *Skaneateles Paper Co. v. American Underwriters' Fire Ins. Co.*, 61 Misc. Rep. 457, 114 N. Y. Supp. 200, that a "deficiency in the preceding year" embraces outstanding claims not paid when the year closed, including money borrowed to pay losses, and is not confined to claims originating in the preceding year, and the company could levy an assessment to extinguish all claims and deficiencies for which it was liable, as well as to supply funds for the current year, though it would bind new members for previous debts and would relieve persons who were members when the old debts were incurred, but had subsequently dropped out.

In *Smith v. Republic County Mut. Fire Ins. Co.*, 82 Kan. 697, 109 Pac. 390, the power to levy assessments under the Kansas statute was involved. The statute of Kansas (Gen. St. 1909, § 4216) provides that in companies organized under the act (relating to mutual fire, lightning, and tornado insurance companies) all notes taken by them in consideration of premiums on their policies shall be enforceable and collectible in part or in whole to pay any loss which may accrue, or defray expenses as provided in the charter and by-laws of the company, and for no other purposes whatever. Section 4227 provides that a reserve fund equal to 10 per cent. of all the premium notes in force shall be maintained out of the cash receipts of the company, which reserve fund shall not be reduced below one-half until an assessment shall have been made upon the premium notes held by the company sufficient to fully reimburse the reserve fund. It was held that the liability of a member of such company to assessment on his premium note exists only where necessary to maintain the reserve fund equal to 10 per cent. of all the premium notes in force, and, when necessary, to pay losses which may accrue and defray expenses, and that an assessment of premium notes not necessary for such purposes, but levied merely for purposes to be developed in the future, is illegal.

949-951. (g) Power and duty to make assessment

950 (g). A by-law which provides that assessments of a mutual fire company shall be made by order of the directors and prorated according to the time the insurance has been in force is not authority for making assessments at stated intervals (*Wolcott v. State Farmers' Mut. Ins. Co.*, 77 Neb. 746, 112 N. W. 371, denying rehearing 77 Neb. 742, 110 N. W. 628). An assessment by a mutual insurance company to pay a loss, to meet which it has no funds, is not invalid because it has made refunds on premiums paid, but for which the assessment would be unnecessary; and this irrespective of the validity of the refunds, and of the liability of those who have received them to return them and of the directors for having made them (*Mutual Security Co. v. Sidney Blumenthal & Co.*, 86 Atl. 573, 86 Conn. 667).

Where authority to levy assessments is conferred on the directors of the company, such authority cannot be delegated to the secretary of the company (*Farmers' Milling Co. v. Mill Owners' Mut. Fire Ins. Co.*, 127 Iowa, 314, 103 N. W. 207). In event of the failure of the proper officers to make an assessment to pay a loss, they may be compelled to do so by proper legal proceedings (*Perry v. Farmers' Mut. Fire Ins. Ass'n*, 139 N. C. 374, 51 S. E. 1025, 2 L. R. A. [N. S.] 165, 111 Am. St. Rep. 791). A suit in equity is maintainable against officers of voluntary insurance association to compel them to levy an assessment for the purpose of paying a loss, duly proved and adjusted, as provided by the contract (*Kimball v. Lower Columbia Fire Relief Ass'n*, 67 Or. 249, 135 Pac. 877).

951-952. (h) Liability to assessment—Membership at time of loss

951 (h). Under the charter and policy of a mutual insurance company, an assessment to cover loss occurring while a policy was in force could be made after expiration of its term (*Mutual Security Co. v. Sidney Blumenthal & Co.*, 86 Atl. 573, 86 Conn. 667).

952 (h). As a member of a mutual insurance company may be assessed for losses and expenses of the company for the period during which he was a member, no limitation in his contract as a stockholder can relieve him from liability to pay a proportionate share of such losses and expenses when the company's affairs are closed up by a receiver (*Nichol v. Murphy*, 108 N. W. 704, 145 Mich. 424). So, too, a receiver for the company upon
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its insolvency may make an assessment to pay its debts upon those who were members when he was appointed (*Skaneateles Paper Co. v. American Underwriters' Fire Ins. Co.*, 114 N. Y. Supp. 200, 61 Misc. Rep. 457), and the receiver of an insolvent mutual insurance association may assess solvent members thereof to make up for the inability of insolvent members to respond to assessments (*Equitable Mut. Fire Ins. Corp.'s Receiver v. Murray*, 131 Ky. 740, 115 S. W. 816).

Holders of policies insured on the cash plan are also liable to assessment on insolvency; such policy holders being regarded as members of the company. But they are entitled to offset unearned premiums on their policies (*Ely v. Oakland Circuit Judge*, 162 Mich. 466, 125 N. W. 375, order modified on rehearing 162 Mich. 466, 127 N. W. 769).

954-956. (k) Effect of termination of membership—Cancellation and withdrawal

954 (k). A mutual insurance company does not by permitting a member to withdraw, relieve him from his obligation to pay his proportion of losses incurred during the life of his policy, even where they were not charged against him prior to his withdrawal. He must pay the proportion of all liabilities occurring during the continuance of his policy up to the time of his withdrawal (*Brown v. Spackman*, 29 Pa. Super. Ct. 638).

955 (k). As to losses which have already occurred, the cancellation of the policy does not relieve the insured from liability for losses occurring prior to cancellation.

Patrons' Mut. Fire Ins. Co. v. Butler, 193 Mich. 648, 160 N. W. 402;
Backenstoe v. Kline, 31 Pa. Super. Ct. 268.

956-958. (l) Same—Forfeiture of policy

956 (l). A provision in a policy of mutual insurance, that a neglect or refusal to pay the dues shall render the policy null and void, cannot be construed so as to relieve the insured from liability to pay losses after he had neglected or refused to pay his dues.

International Savings & Trust Co. v. Stenger, 31 Pa. Super. Ct. 294.
And to the same effect, see *Nelson v. Farm Property Mut. Ins. Ass'n of Iowa*, 127 Iowa, 603, 103 N. W. 966.

Nor can the insured subsequently incumber the property, contrary to the terms of the policy, and then claim release of liability for assessments because of his own wrong (*Nelson v. Farm Property Mut. Ins. Ass'n of Iowa*, 103 N. W. 966, 127 Iowa, 603).

958-959. (n) Same—Expiration of policy and destruction of property

958 (n). The existence of an unliquidated and disputed claim of a member of a mutual fire insurance company for a loss does not justify refusal to pay future assessments so far as future insurance is concerned (*Stutzman v. Cicero Mut. Fire Ins. Co.*, 150 Wis. 254, 136 N. W. 604).

959-961. (o) Estoppel and waiver of right to deny liability

960 (o). Where, in applying for membership in a mutual fire insurance association, the applicant represents that he owns the property to be insured, he is estopped to thereafter deny that he owned it in order to defeat liability to the company for assessments levied on him (*Nelson v. Farm Property Mut. Ins. Ass'n of Iowa*, 103 N. W. 966, 127 Iowa, 603).

961-964. (p) Levy and collection of assessments

961 (p). Where an assessment is for some purpose other than the payment of a loss, the records of the company are insufficient to establish the validity of such assessment unless it affirmatively appears therefrom that the statute in relation to assessments has been complied with (*Wolcott v. State Farmers' Mut. Ins. Co.*, 77 Neb. 742, 110 N. W. 628, rehearing denied 77 Neb. 746, 112 N. W. 371).

The president of a mutual insurance company being a member of the board of directors, there is no difference, affecting the validity of an assessment, between the provision of the charter and by-laws that it shall be made by the "board of directors" and that of the policy that it shall be made by "the president and directors" (*Mutual Security Co. v. Sidney Blumenthal & Co.*, 86 A. 573, 86 Conn. 667).

The rights and liabilities of the members of a mutual fire insurance company are primarily fixed by contract, and, where a policy issued by a foreign insurance company stipulates that assessments shall be made in pursuance of the laws of the state of the origin of the company, the statutes thereof regulating the levy of assessments are a part of the contract, and consequently, where the court of such state directed the levy of assessments on the members of a mutual fire insurance company in the manner provided by the laws of the state, thus made a part of the contract of insurance by the stipulations of the policies, the determination of the court was *prima facie* evidence of the validity and necessity of the assessments

(Hammond v. Knox, 109 N. Y. Supp. 367, 125 App. Div. 9, affirmed in 194 N. Y. 555, 87 N. E. 1120).

965-967. (r) Uniformity of assessments

965 (r). An assessment by a mutual company must be made on all members under a duty to contribute, and an omission of some who are liable for their proportion of the losses will invalidate the assessment (Wolcott v. State Farmers' Mut. Ins. Co., 77 Neb. 746, 112 N. W. 371, denying rehearing 77 Neb. 742, 110 N. W. 628).

A mutual hail and cyclone insurance company is required by Gen. St. Minn. 1913, §§ 3307, 3414, to make assessments on all members liable thereto pro rata, and assessments levying a greater rate upon members in one locality than those in another cannot be enforced. Minnesota Farmers' Mut. Ins. Co. v. Landkammer, 148 N. W. 305, 126 Minn. 245; Same v. Sweet, 148 N. W. 306, 126 Minn. 528.

967-970. (s) Amount of assessments

968 (s). An assessment made by a court or receiver on the insolvency of the company is conclusive as to the amount of the assessment.

International Savings & Trust Co. v. Kleber, 29 Pa. Super. Ct. 200; Brown v. Spackman, 29 Pa. Super. Ct. 638; Backenstoe v. Kline, 31 Pa. Super. Ct. 268. Compare Stone v. Penn Yan, K. P. & B. Ry., 109 N. Y. Supp. 374, 125 App. Div. 94. And see Daniel v. Citizens' Mut. Fire Ins. Co., of Jackson, 149 Mich. 626, 113 N. W. 17, holding that where an assessment by a receiver of a mutual insurance company is excessive, adequate relief may be had by vacating it or by securing a proper distribution of the funds raised thereby, and a bill of review does not lie.

In Hammond v. Knox, 125 App. Div. 9, 109 N. Y. Supp. 367, affirmed in 194 N. Y. 555, 87 N. E. 1120, the policy stipulated that the insured should pay, in addition to the cash premium, all such sums as might be assessed by the directors provided that the assessments should not exceed a sum equal to the amount of the cash premium. It was held that the amount of assessments was fixed by the policy, and was determined by the amount of the cash premium provided for in the policy, and not by the sum actually paid by insured on a settlement between himself and the company without prejudice to any claim for assessments.

969 (s). An assessment in excess of the amount necessary to defray accrued losses and expenses is invalid (Settle v. Farmers' & Laborers' Co-operative Ins. Ass'n of Monroe County, 150 Mo. App. 520, 131 S. W. 136). But it is proper for a mutual insurance

company to include in an assessment for losses a reasonable estimated sum to cover the cost of collection of assessments, and also the expenses incident to adjustment of the amount of a loss (*Mutual Security Co. v. Sidney Blumenthal & Co.*, 86 Atl. 573, 86 Conn. 667).

970-972. (t) Notice of assessments

970 (t). Where the charter of a mutual insurance company provides the notice of assessment that shall be given to members, a member can only be put in default by the notice provided for, and his knowledge otherwise acquired is not sufficient (*Miner v. Farmers' Mut. Fire Ins. Co. of Manistee, Benzie, and Mason Counties*, 117 N. W. 211, 153 Mich. 594). But it has been held that where the charter of a mutual assessment fire company which required yearly assessments, provided that notice by mail of the new assessment should be sufficient, and required the insured in case of a change of address to notify the secretary, which she did not do, the giving of notice in an unsealed letter which could not be forwarded is sufficient to charge the insured with notice though she did not receive it for that reason (*Mutual Fire Ins. Co. v. Turner*, 115 Va. 631, 79 S. E. 1067). And it was held in *Acton v. Farmers' Home Ins. Co.*, 124 Ky. 677, 99 S. W. 955, that Ky. St. 1903, § 711, providing that the secretary of a mutual company shall, within 30 days after any assessment has been made, notify every member of the corporation by written notice, stating the amount due the corporation from the members, the time when, and to whom, it shall be paid, and the use to be made of the money collected, does not require notice to a member who tenders his policy for cancellation.

The Massachusetts statute (Rev. Laws, c. 118, §§ 47, 48, et seq.) relating to assessments by mutual companies authorizes the Supreme Judicial Court to order an assessment in certain instances. It was held in *Hammond v. Knox*, 125 App. Div. 9, 109 N. Y. Supp. 367, affirmed in 194 N. Y. 555, 87 N. E. 1120, that as the real purpose of the statute is to provide a summary speedy method of providing a fund to meet losses, notice by mail of the application to the court for the levy of an assessment and of the hearing before the auditor appointed for such purpose is sufficient, and a member could not thereafter object to the levy on the ground that no process of the court was served on him.

972-973. (u) Payment of assessments

972 (u). A provision in the charter of a mutual insurance company requiring the payment of assessments "within thirty days after the issuing of said notice" of assessment must be construed as meaning that payment must be made within 30 days after the giving or delivery of such notice (*Miner v. Farmers' Mut. Fire Ins. Co. of Manistee, Benzie, and Mason Counties*, 117 N. W. 211, 153 Mich. 594).

973-974. (v) Lien for assessments

973 (v). Under Ky. St. 1903, § 712, giving a co-operative insurance association a lien upon property insured to secure assessments, and providing that on loss the subsequent purchaser or junior lienholder shall be entitled to the benefit of the insurance, the lien operates against a subsequent purchaser, though without notice thereof at the time of purchase. But the lien so given does not extend to membership fees but simply to assessments and calls (*Farmers' Home Ins. Co. v. Carey*, 130 Ky. 602, 113 S. W. 841).

974-975. (w) Enforcement of lien

974 (w). A court of equity has inherent power to enforce the lien given mutual fire insurance companies by Laws 1912, c. 171, § 18, upon the property insured, and it is unnecessary for the statute to expressly confer jurisdiction (*Huggins v. Home Mut. Fire Ins. Co.*, 107 Miss. 650, 65 South. 646).

4. ACTIONS TO ENFORCE PREMIUM NOTES AND ASSESSMENTS**976-977. (a) Right of action in general**

976 (a). Assumpsit lies to recover an assessment made by decree of court in a proceeding to wind up a mutual insurance company, where the liability for the assessment is primarily based upon statute (*Swing v. American Glucose Co.*, 123 Ill. App. 156).

977-979. (b) Defenses

977 (b). Where the court authorized a receiver of an insolvent mutual insurance company incorporated in Ohio to sue policy holders for assessments, and fixed the percentage to be assessed on the several policies, the actual amount being fixed by the receiver, a policy holder cannot defend on the ground that the assessment is not fixed by the directors, as required by the laws of Ohio (*Swing*

v. Consolidated Fruit Jar Co., 63 Atl. 899, 74 N. J. Law, 145). In Bankers' Mut. Casualty Co. v. First Nat. Bank of Council Bluffs, 131 Iowa, 456, 108 N. W. 1046, it was held that where an insurance company has adopted articles of incorporation expressly assuming to transact the business of burglary insurance, and has secured from the proper state authority permission to do such business, in an action on a premium note insured cannot defend on the ground that the writing of burglary insurance was ultra vires.

978 (b). The holder of a policy in a mutual hail association is not entitled to set off against an assessment of a particular year in an action to enforce it a balance of a loss in a prior year remaining unpaid after the insured had received on that loss a proper proportion of funds available for that purpose under his agreement with the association (Farmers' United Tp. Mut. Hail Ass'n v. Dally, 107 N. W. 555, 98 Minn. 13).

979-981. (c) Same—Fraud and misrepresentation

979 (c). In an action by the receiver of a mutual company to recover an assessment, a fraud perpetrated by the company on a member in inducing him to become such cannot be set up as against the rights of bona fide creditors and later members of the company which had intervened after the date when defendant became a member of the company (Van Dyke v. Baker, 63 Atl. 594, 214 Pa. 168). So, too, a member of a mutual insurance company who has been induced to become a member by the fraudulent representations of the officers of the company cannot set up the fraud as a defense to an action by the receiver of the company for assessments, where other persons have subsequently joined the company as innocent third parties (Tanner v. O. M. Weber Co., 59 Pa. Super. Ct. 14, 19).

981. (d) Limitations

981 (d). Limitations begin to run against the right of action by the receiver of an insolvent mutual company to recover an assessment from the date of the assessment and not from the date of declared insolvency or of the appointment of a receiver.

Nichol v. Newman, 160 Mich. 582, 125 N. W. 760; Schofield v. Turner, 28 Pa. Super. Ct. 177; Schofield v. Turner, 62 Atl. 1068, 213 Pa. 548. The defense that an action on an assessment against policy holders in a mutual insurance company is barred by reason of the lapse of six years from and after the making of a prior assessment and notice thereof served upon the defendant with demand

for payment is conclusive against a trustee in insolvency seeking to enforce such subsequent assessment. *Swing v. Ohio Cultivator Co.*, 29 Ohio Cir. Ct. R. 365.

In *Swing v. Arkadelphia Lumber Co.*, 90 Ark. 394, 119 S. W. 265, it appeared that the court had dissolved a mutual insurance corporation for insolvency and appointed a trustee. Nearly six years later, the same court made an assessment against the policy holders. The directors had made monthly assessments against such holders up to the time of the dissolution. About eight years afterwards the trustee sued a policy holder for the assessment levied by the court. It was held that, to defeat the defense of limitations, the trustee must show that the assessments by the directors were not included in that by the court.

982-984. (f) Pleading—Declaration or complaint

982 (f). A petition in an action by an insurance company organized under Ky. St. 1903, c. 32, subd. 5 (sections 702-722), to recover from a delinquent policy holder the amount of any assessment due, which does not aver the amount of the assessment, the necessity and purpose of it, and when and by whom it was made, is insufficient (*Acton v. Farmers' Home Ins. Co.*, 124 Ky. 677, 99 S. W. 955, 30 Ky. Law Rep. 919). And generally to subject insured property to the payment of the pro rata of insured of the indebtedness of a co-operative insurance association, the petition must allege that such pro rata is based upon calls or assessments, and set up the facts showing the same to have been legally made (*Farmers' Home Ins. Co. v. Carey*, 130 Ky. 602, 113 S. W. 841).

In *Swing v. Red River Lumber Co.*, 101 Minn. 428, 112 N. W. 393, it was held that a complaint alleging that the corporation was duly adjudged insolvent; that plaintiff was appointed trustee of the creditors and policy holders; that, while defendant held five policies of insurance, losses were incurred by the company in the amounts set forth in the complaint; that the Supreme Court of Ohio decreed an assessment to pay the debts of the company; that the defendant's necessary assessment was a certain sum, and that defendant had refused to pay the sum—states a good cause of action.

5. RIGHT TO AND LIABILITY FOR PREMIUMS—LIFE AND ACCIDENT INSURANCE**990-991. (a) Liability for premiums**

990 (a). While it is true that unearned or future premiums on a life policy do not constitute a debt of the insured (*Union Mut. Life Ins. Co. v. Adler*, 38 Ind. App. 530, 73 N. E. 835, rehearing denied 38 Ind. App. 530, 75 N. E. 1088), yet the insurance of the life is a valid and valuable consideration for the promise of the insured to pay a premium (*Security Life & Annuity Co. v. Costner*, 149 N. C. 293, 63 S. E. 304). So, too, it was held in *Johnson v. Sovereign Camp, Woodmen of the World*, 119 Mo. App. 98, 95 S. W. 951, that inasmuch as by Rev. St. 1899, § 894, all written instruments whereby the payment of money is promised import consideration, an allegation that the benefit certificate sued on was issued for a "valuable consideration" was sufficient.

Nevertheless, to constitute a consideration for the payment of premiums on a life policy, it is essential that the insurer incur a liability by a contract which is not affected by any infirmity which it may elect to interpose as a defense to an action on the policy, if the life insured should end.

Mahoney v. Metropolitan Life Ins. Co., 80 N. J. Law, 136, 76 Atl. 458;
Metropolitan Life Ins. Co. v. Felix, 75 N. E. 941, 73 Ohio, 46, 4 Ann. Cas. 121.

991 (a). In *Graham v. Remmel*, 86 Ark. 535, 112 S. W. 141, it appeared that defendants applied for a joint life policy on a ten-year distribution plan, and executed the note sued on for the premium, payable 30 days after delivery of the policy. On the policy being tendered, defendants requested that it be exchanged for a policy issued on the five-year distribution plan, but a misunderstanding arose as to the nature of the latter policy with reference to which the minds of the parties never met, whereupon the insurance company reissued the first policy and tendered the same to defendants, which they refused to receive. It was held that the transaction with reference to the five-year policy did not cancel or abrogate defendants' agreement to accept and pay for the original policy, so as to affect their liability on a note given for the premium.

992-994. (b) Amount of premiums

993 (b). Contracts of life insurance often contain provisions intended to give the company the right to vary the amount of pre-

miums to be paid. The right to raise the rate of premium cannot be predicated on a provision doubtful in its terms. So it has been held that a stipulation on the back of an old-line policy for the levy of additional assessments is nugatory, in that it is inconsistent with the main contract, and therefore cannot control.

Knott v. Security Mut. Life Ins. Co., 144 S. W. 178, 161 Mo. App. 579;
Buchanan v. Same (Sup.) 144 S. W. 185.

Where a contract of insurance provided that in no event should assured be required to pay in excess of rates contained in a table on the back of the policy, the table was incorporated into the contract, and insurer could not lawfully demand premiums exceeding the maximum rates fixed by such table (*Rosenfeld v. Boston Mut. Life Ins. Co.*, 110 N. E. 304, 222 Mass. 284).

An insurance agent soliciting and obtaining applications, collecting premiums, and delivering policies has implied authority to state to applicants with binding effect on the insurer what the amount of the annual premium will be (*Illinois Bankers' Life Ass'n v. Dodson* [Tex. Civ. App.] 189 S. W. 992). But it has been held in Kentucky that a statement of an agent of insurer soliciting a policy that insurer was not in the habit of charging any more from year to year than the first premium paid, and that the applicant, though shown the clause authorizing increased premiums on a specified condition, would not have to pay a higher premium from year to year, was simply an expression of opinion of the agent, and did not affect the terms of the policy (*La Rue v. Provident Saving Life Assur. Society of New York*, 138 Ky. 776, 129 S. W. 104).

In *Jones v. Provident Sav. Life Assur. Soc.*, 147 N. C. 540, 61 S. E. 388, 25 L. R. A. (N. S.) 803, it appeared that the policy, which was issued for three months, bound insurer to renew quarterly during insured's life on the payment of premiums for the age attained according to a schedule of increasing rates. It provided that it might be exchanged at any time after insured became 60 years old for a policy on the uniform premium plan at the rate for his then age as printed below. Below was a schedule of rates ranging from age 60 to 65 and beneath the columns specifying the rates was printed "&c." It was held that the policy did not become automatically a level-premium policy, without exchange, when insured became 65 years old, merely because the schedule did not specify rates for a greater age, but that the rates should increase proportionately if the ordinary rate should be changed to a level rate after

insured became 65. And when a policy provided for an annual increase in the premiums based on the age of insured and stipulated that, if the mortality in insurer should be as favorable as in the best of other insurance companies, the insurance would be extended at the original rate of premium, the company was authorized, on the evidence that its mortality was more unfavorable than in other insurance companies, to make the increases in the premiums provided for (*La Rue v. Provident Saving Life Assur. Society of New York*, 138 Ky. 776, 129 S. W. 104).

In *State Bank of Springfield v. United States Life Ins. Co.*, 238 Ill. 148, 87 N. E. 396, affirming 142 Ill. App. 624, the facts were these: Two policies of insurance, giving the owners the right to exchange them for two 15-year participating endowment policies on payment of the difference in premiums between the two forms of insurance were renewed by policies made payable to a bank, to whom the originals had been assigned as collateral security. On each of the renewal policies the age of insured was stated as 61 years, and on the margin of each insurer made a written indorsement, reciting that the policy was issued pursuant to the prior contract. Each provided, by recitals of certain "conditions," that it might be changed on the anniversary of its date "to a participating policy bearing original date and at the premium rate of the original age upon payment of the difference in premiums, with four per cent. interest per annum, compounded." Each had attached a table of rates for various kinds of insurance, including 15-year endowment; the rates for the age 51 being underscored in red ink. It was held that the words "original date" and "original age" in the language quoted from the "conditions" meant the date of the first policies, and the age of insured as set out therein, which was 51 years, and the bank was entitled to take out endowment policies on the basis of that age.

In *Whiting v. Fidelity Mut. Life Ins. Ass'n*, 137 App. Div. 758, 122 N. Y. Supp. 1014, affirmed in 203 N. Y. 597, 96 N. E. 1134, the policy provided that insured should pay a stated sum for the mortality fund and a stated sum for an equation fund during the continuance of the contract, and that, at the end of the probable life of insured, he could surrender the policy and receive a cash disability benefit. It was held that the policy was not terminated at the end of the probable life of insured so as to authorize the company to charge new premiums, where insured does not exercise the option to surrender, especially in view of a provision that, if not surrendered at the end of insured's probable life, its equitable share of

the equation fund shall thereafter be confined to the insurance afforded under the policy.

On the other hand, a life insurance company may reduce its rates for future business, if the enterprise is not thereby endangered, by actual reduction or by increasing the amount of insurance purchasable for the same amount (*Blanchard v. Prudential Ins. Co. of America*, 78 N. J. Eq. 471, 79 Atl. 533).

The right of the insured to have dividends due under the policy applied to the reduction or payment of premiums depends, of course, on the terms of the contract. In *Empire Life Ins. Co. v. Wier*, 135 Ga. 130, 68 S. E. 1035, the policy provided that the company one year from the date of the policy should pay insured a certain sum as a dividend guaranteed to be declared upon that day upon the policy, provided insured was alive at that date, the policy in force, and all premium notes and premiums due, including the one due upon that date, if any, should have been paid, and the subsequent year's premium satisfactorily secured, and provided that such dividend when earned might be used to pay any premium or other indebtedness to the company. It was held that the dividend when earned might be applied to pay any premium or indebtedness to the company, but actual payment of the premium due on the date when the dividend was due was one of the conditions precedent to earning of the dividend, and such payment did not result automatically by mere force of the contract, when, under the terms of the policy, there was nothing otherwise due to insured which the company might appropriately apply as payment of the premium.

Where a policy of insurance for a year contains a table of rates to be paid for shorter terms than a year, the acceptance of monthly premiums at the cheaper rate for the year's contract does not estop the insurer from suing for the difference between the lower and the higher rate on cancellation of the policy by the assured (*Ætna Life Ins. Co. v. American Zinc, Lead & Smelting Co.*, 154 S. W. 827, 169 Mo. App. 550).

Where a life insurance policy was dated back seven years, insured's agreement to pay the premiums for those years was valid and supported by a consideration only to the extent of the net reserve value of such a policy issued seven years prior to that date. *Hay v. Meridian Life & Trust Co.*, 57 Ind. App. 536, 101 N. E. 651.

994-996. (c) Payment of premiums in general

994 (c). If an insurance company authorizes its policy holders to transmit premiums by mail, and a remittance is made in

apt time to reach the company on or before the date when the premium falls due, it is a sufficient payment (*Illinois Life Ins. Co. v. McKay*, 64 S. E. 1131, 6 Ga. App. 285). But a special provision of a policy providing how payment of premium must be made prevails over a general provision which makes a policy subject to the laws of a particular state which state has a statute providing a different method of payment (*Rose v. Mutual Life Ins. Co.*, 144 Ill. App. 434, affirmed 240 Ill. 45, 88 N. E. 204).

995 (c). An insurance company may accept the assumption of personal liability by its agents in lieu of payment of a premium in behalf of another, to the same extent that it must look to its authorized agent to deliver or pay over to the company premiums actually paid to him in cash. And the company may in the absence of any provision to the contrary in its charter, extend credit in the payment of insurance premiums, and such credit may be extended to an agent who has assumed payment of a premium in behalf of insured (*Williams v. Empire Mut. Annuity & Life Ins. Co.*, 8 Ga. App. 303, 68 S. E. 1082). The annual premium for a life insurance policy is not a debt within the rule governing the payment of debts by check or draft (*Mutual Life Ins. Co. v. Chattanooga Savings Bank*, 47 Okl. 748, 150 Pac. 190, L. R. A. 1916A, 669).

Where the policy provides that annual dues should be paid on a certain date, the insurance company cannot, without the consent of the policy holder, change the date of payment (*Barber v. Hartford Life Ins. Co.*, 269 Mo. 21, 187 S. W. 867, 874). If under a life policy providing for quarterly premiums, the date of payment of first premium might be taken as fixing date for payment of future premiums, to prevent a forfeiture for nonpayment of premiums such construction would be followed (*Prudential Ins. Co. of America v. Stewart*, 237 Fed. 70, 150 C. C. A. 272).

Evidence considered, and held to show that delivery of plaintiff's policy was conditional upon its acceptance by him within 30 days, and that, as it was not accepted until after October 1st, two monthly premiums paid by him on October 4th paid the premiums for October and November. *Rivard v. Continental Casualty Co.*, 118 Me. 46, 100 Atl. 101.

996-998. (d) Persons to whom payment may be made

997 (d). Where a policy of life insurance acknowledges payment of the first premium, and provides that premiums must be paid at the home office, unless otherwise provided, and, in any

case, in exchange for an official receipt, etc., countersigned by the party to whom payment is made, possession of such a receipt would ordinarily be evidence that the possessor was an agent of the company authorized to receive the premiums. But the insured has no right to assume that an agent who does not produce the official receipt has authority to receive premiums subsequent to the first (*Lauze v. New York Life Ins. Co.*, 74 N. H. 334, 68 Atl. 31). An agent having authority to collect from insured a past-due premium and take an application from him for reinstatement, had authority to collect from him another premium due in a few days, necessary to preserve the insurance under the reinstatement (*Parr v. Illinois Life Ins. Co.*, 178 Mo. App. 155, 165 S. W. 1152).

998-1003. (e) Payment by note

998 (e). The custom of an insurance company in dealing with its general agent in the matter of premiums may give an opportunity for an agent to accept notes for premiums, he becoming liable to the company for its share thereof (*Cranston v. West Coast Life Ins. Co.*, 72 Or. 116, 142 Pac. 762). The payment of a premium in cash may be waived by the proper officers of an insurance company, and a note or other obligation accepted. In such case the provision for interest in the note supplies consideration for the delay in payment of the premium. The note, however, is a separate and independent transaction, and has no relation to the contract of insurance except as stipulated in the policy (*Arnold v. Empire Mut. Annuity & Life Ins. Co.*, 60 S. E. 470, 3 Ga. App. 685).

Of course, in any event, to render one liable on a note for premium, there must be a contract of insurance. An application and note, while constituting a contract, is but an executory or conditional contract, on which the company can sue only for damages, and not on the note (*Ten Brock v. Jansma*, 161 Mich. 597, 126 N. W. 710). The delivery of a life insurance policy is a sufficient consideration for a note previously given for the first premium (*Wadsworth v. Walsh*, 128 Minn. 241, 150 N. W. 870). Where the insured's original policy had lapsed, and subsequently he made an application for reinstatement, with a note for premium, there can be no recovery on the note, in the absence of notice of reinstatement or the tender of a new policy (*State Life Ins. Co. v. Harrah*, 169 Mich. 127, 134 N. W. 996). If insured

retained the policy, he could not defeat recovery in an action on a note given for the premium (*Boykin v. Franklin Life Ins. Co.*, 82 S. E. 60, 14 Ga. App. 666). Payment of insurance premium by note may be either absolute or conditional dependent upon parties' intention as determined by policy or note (*Farmers' & Merchants' Mutual Life Ass'n v. Mason* [Ind. App.] 116 N. E. 852).

A promise to execute a life policy if, after medical examination, the maker of a note for the premium proves insurable, will not authorize a recovery on the note, where no offer has been made to deliver the policy, though the maker of the note refuses to submit to a medical examination (*Alligood v. Daniel & King*, 12 Ga. App. 220, 76 S. E. 1083). But where a note for premium was given as part of the application, and the insurance was not issued because the maker refused to present himself for medical examination, the note was not subject to the defense of want of consideration, though the binding receipt was conditional on the maker's taking and passing a medical examination before the policy was issued (*Hartington Nat. Bank v. Giles*, 94 Neb. 300, 143 N. W. 197).

Though a note given for premium is ordinarily a payment of the premium, it will not have that effect if the note provides that it is given on account of the policy and unless paid when due the policy will lapse as for nonpayment of premium (*Union Mut. Life Ins. Co. v. Adler*, 38 Ind. App. 530, 73 N. E. 835, rehearing denied 38 Ind. App. 530, 75 N. E. 1088). The provision of life policy allowing 30 days' grace to pay premium does not allow 30 days after maturity of a note executed by insured to company for a premium due at date thereof; policy providing failure to pay such note would render it void (*Kansas City Life Ins. Co. v. Leedy* [Okl.] 162 Pac. 760, L. R. A. 1917C, 917).

Rev. St. Tex. 1911, art. 4741, requiring life policies to require all premiums to be paid in advance, and article 4954, prohibiting discrimination as to the premiums charged, does not avoid a policy because the company extended credit for, and received another's obligation as, payment of the first premium. *Amarillo Nat. Life Ins. Co. v. Brown* (Tex. Civ. App.) 168 S. W. 658.

1000 (e). Where a life insurance company elected, with knowledge of all the facts, to cancel a policy for nonpayment of a premium note, and demanded payment for the proportionate part of the note for the time the insurance was in force, it could not thereafter rescind its action and recover the full amount of the note

(*Parker v. Murphy*, 107 N. Y. Supp. 202, 56 Misc. Rep. 541). But the fact that a life policy authorized the company to declare it void for nonpayment of a premium note did not absolve the insured from liability on the note, where the company elected to continue the policy (*Parker v. Simpson*, 107 N. Y. Supp. 199, 56 Misc. Rep. 537).

Though ordinarily an agent may accept only cash in payment of the premium, an agent clothed with authority to transact generally the company's business in a state and to collect the premiums, and granted permission to accept notes to himself in lieu of cash premium payments, the company looking to him instead of the policy holder, has authority to bind the company by accepting notes in lieu of cash payments of premiums, whether he paid the company or not (*Mutual Life Ins. Co. v. Abbey*, 88 S. W. 950, 76 Ark. 328); and the fact that a premium note was payable to insurer's agent and was transferred to insurer is immaterial in insurer's suit on the note; insurer being bound by the agent's acts (*Security Life & Annuity Co. v. Costner*, 63 S. E. 304, 149 N. C. 293).

1001 (e). Though it was held in *Life Ass'n of America v. Cravens*, 60 Mo. 388, that the failure of the company to comply with an agreement to make insured a loan on his policy did not relieve him from liability on his premium note, it has been held in New York (*Smith v. Dotterweich*, 200 N. Y. 299, 93 N. E. 985, 33 L. R. A. [N. S.] 892, reversing 132 App. Div. 489, 116 N. Y. Supp. 896) that, where a note for a premium was made and delivered to the general agent on oral agreement and understanding that the policy would not be taken or have any effect, nor the note be binding, unless the agent secured a loan for the maker, the securing of the loan is a condition precedent, and, in an action on notes given in renewal of the original note, the maker, on proof of nonperformance of the condition, is not liable.

1002 (e). The tender of a policy substantially different from that applied for, unless accepted, will not furnish a consideration for a premium note executed in advance (*Empire Mut. Annuity & Life Ins. Co. v. Avery*, 59 S. E. 324, 3 Ga. App. 97). But when the policy tendered is different from that which insured had contracted for, it is his duty to ascertain that fact within a reasonable time and return it for cancellation, and, not having done so, the form of the policy was no defense to an action on a premium note (*Hutchinson v. Palmer*, 40 South. 339, 147 Ala. 517).

If the policy is invalid for want of insurable interest, the note for

the premium is without valid consideration, and is unenforceable (*Little v. Arkansas Nat. Bank*, 105 Ark. 281, 152 S. W. 281).

A note for a life insurance premium is not void, on the ground that the agent receiving same had not registered and paid his state license tax. *Loyd v. Pollitt*, 144 Ga. 91, 86 S. E. 233.

Even if a contract by a life insurer giving a class of 600 of its policy holders, including defendant, special benefits, is void as violating Revisal 1905, § 4775, that does not defeat defendant's liability on a note for premiums at the same rate charged all persons of his age for that kind of policy; he having retained the policy (*Security Life & Annuity Co. v. Costner*, 63 S. E. 304, 149 N. C. 293).

1003 (c). Where an insurance company did not transfer its assets to another company until some months after its policy in question was issued to defendant, such transfer without defendant's consent operated to relieve him from liability on a premium note only to the extent of the value of the insurance for the term covered by the note subsequent to the transfer (*Vette & Hoffman v. Evans*, 86 S. W. 504, 111 Mo. App. 588).

Where defendants gave their note for a yearly premium on an insurance policy, and afterwards paid a portion of the note and asked that it be surrendered and canceled, so that it would not show on the books against them, and the payees destroyed the note, even if the payees agreed at that time to accept the quarterly premium and discharge the balance of the indebtedness, such release was not based on a consideration, and was void. *Allen v. Batz*, 116 Minn. 38, 133 N. W. 79.

1004-1005. (f) Effect of fraud or misrepresentation

1004 (f). If the insured is induced to take the policy and give his note for the premium through the fraud of the company or its agent, he may take advantage of such fraud to escape liability on the note, if he acts promptly on discovery of the fraud.

Rommel v. Witherington, 88 S. W. 967, 76 Ark. 373; *Summers v. Alexander*, 30 Okl. 198, 120 Pac. 601, 38 L. R. A. (N. S.) 787; *Curry v. Stone* (Tex. Civ. App.) 92 S. W. 263; *Security Life Ins. Co. of America v. Stephenson* (Tex. Civ. App.) 136 S. W. 1137. As to sufficiency of evidence to show fraud, see *State Life Ins. Co. of Indianapolis v. Bolton*, 82 Neb. 622, 118 N. W. 122.

1005-1006. (g) Effect of receipt

1005 (g). The delivery of a formal receipt for the payment of a life insurance premium is strong prima facie proof that the premium

has been paid, and places the burden on the insurance company of showing that the receipt had been issued by mistake, and that there had been in fact no payment (*Security Mut. Life Ins. Co. v. Kleutsch*, 169 Fed. 104, 95 C. C. A. 432). The settlement of an interest charge on a preceding premium loan made between an insured and the company at the time a premium was paid cannot be impeached or opened after the death of the insured, in the absence of any showing of fraud or mistake (*Johnson v. Mutual Ben. Life Ins. Co.*, 143 Fed. 950, 75 C. C. A. 22).

1006-1008. (h) Actions for premiums

1006 (h). Where a premium note on a life policy was payable to the agent, and, on the maker's refusal to comply with the contract and take the policy, the agent settled with the company for any interest it had in the contract, he was authorized to sue on the note in his own name as the real party in interest by Kirby's Dig. §§ 5999, 6002 (*Graham v. Remmel*, 86 Ark. 535, 112 S. W. 141).

In an action on a note for an insurance premium, a separate defense alleging that plaintiff issued a policy to defendant, and shortly thereafter notified defendant to return the policy because it was necessary to change the same owing to a ruling of the Insurance Commissioner of the State respecting it, that defendant returned the policy, whereupon it was canceled, and that the consideration for the note thereupon failed, was fatally defective for failure to allege that the note in controversy was given in payment for the policy (*Welles v. Colorado Nat. Life Assur. Co.*, 49 Colo. 508, 113 Pac. 524). And in the same case it was further held that a separate defense alleging that subsequent to the time the insurance company called and canceled the policy in accordance with its agreement to alter the same it issued and tendered to defendant a second policy which defendant refused to accept and returned to it, and that the original policy was received by plaintiff and retained, was fatally defective for failure to show that the note sued on was given for the policy alleged to have been canceled.

1007 (h). In action on note for premiums, it was incumbent on defendant to allege and prove that the note was made on consideration or inducement not specified in policies in violation of Insurance Law N. Y. § 89 (*McGee v. Felter*, 135 N. Y. Supp. 267, 75 Misc. Rep. 349). And where, in defense of a note given for a premium, defendant claimed that the policy was to be delivered within a reasonable time, and that it was not so delivered, the burden was

on him to show that the time consumed was unreasonable (*De Leon v. Walter*, 163 Ala. 499, 50 South. 934, 19 Ann. Cas. 914).

The admissibility of the evidence in an action on a note given for premiums is considered in *Doyle v. Hill*, 75 S. C. 261, 55 S. E. 446; *Waggoner v. Burg* (Tex. Civ. App.) 147 S. W. 342. The sufficiency of the evidence to require submission of issues to the jury is considered in *Allen v. Smith*, 165 Ala. 247, 51 South. 724; *Simpson v. Goodman*, 92 Miss. 89, 45 South. 615.

Alleged fraud in obtaining a premium note is not sustained by proof of an agreement between defendant and the agent writing the policy that defendant would not be called upon to pay the note if he would assist the agent (*Security Life Ins. Co. of America v. Allen* [Tex. Civ. App.] 170 S. W. 131).

In an action to recover the whole of the first premium on policies of insurance, where it appears that the agent of the company, with full authority from the company to deliver the policy and receive payment of the premium, accepts a note for part of the premium, and for the balance allows a rebate illegal under Act March 31, 1911 (P. L. 39), and, when the note is paid, embezzles the proceeds, recovery will be allowed only for the amount of the illegal rebate. *Etna Life Ins. Co. v. Clark*, 62 Pa. Super. Ct. 528.

6. DISCRIMINATION IN RATES—LIFE INSURANCE

1009-1010. (b) Validity of statutes

1009 (b). Contracts of life insurance unlike other contracts are subject to police regulation, so that an act (Hurd's Rev. St. 1909, c. 73, §§ 27-30) prohibiting discrimination between life insureds of the same class and equal expectation of life is not unconstitutional (*People v. Hartford Life Ins. Co.*, 96 N. E. 1049, 252 Ill. 398, 37 L. R. A. [N. S.] 778).

The validity of such statutes is also upheld in *People v. American Life Ins. Co.*, 267 Ill. 504, 108 N. E. 679.

The South Carolina statute (Act March 2, 1916, § 7), exempting the state warehouse commissioner from its operation as to discriminatory rates for insurance on property, is constitutional and valid. *Henderson v. McMaster*, 104 S. C. 268, 88 S. E. 645.

Such statutes, however, do not apply to existing contracts made before their adoption, and the rights of the holder of a policy issued prior to the statute are not controlled thereby (*Mutual Ben. Life Ins. Co. v. Emig's Adm'r*, 141 S. W. 38, 145 Ky. 660). So it has been held that the Illinois statute (Hurd's Rev. St. 1908, c. 73, §

27), providing that contracts reducing premiums due on insurance policies must be embodied in such policies, has no application to policies issued prior to its enactment (*Otis v. Provident Savings Life Assurance Society of New York*, 173 Ill. App. 70).

1010. (c) To what companies statute applies

1010 (c). All insurance companies doing business in this state, including those organized on the assessment plan pursuant to the act of June 22, 1893, are subject to the provisions of the act of June 19, 1891, prohibiting unjust discrimination (*People v. United States Life Endowment Co.*, 143 Ill. App. 517).

1010-1013. (d) What constitutes a violation of the statute

1010 (d). A statute prohibiting discrimination in rates does not forbid the extension of credit for premiums due upon the policies. Hence it does not make it unlawful to accept the note of the assured for the amount of the premium with interest from the date thereof at the rate fixed by law (*Ellis v. Anderson*, 49 Pa. Super. Ct. 245). So, too, a note for the first premium without interest, and payable a year and a half after date, is not violative of Insurance Law N. Y. § 89, prohibiting discriminations (*McGee v. Felter*, 135 N. Y. S. 267, 75 Misc. Rep. 349).

Acceptance of note, instead of cash, in payment of premium, is not within the statute. *Illinois Life Ins. Co. v. Kenaedy*, 191 Ill. App. 29; *Biggs v. Reliance Life Ins. Co.*, 137 Tenn. 598, 195 S. W. 174

An agreement by an insurance company to accept an unliquidated claim in payment of increased premium rate due on a policy, on condition that a receipted bill be given each time for such deduction, is not discriminating within the meaning of the Illinois or New York law. *Otis v. Provident Savings Life Assurance Society of New York*, 173 Ill. App. 70.

1011 (d). It was held in *Interstate Life Assur. Co. v. Dalton*, 165 Fed. 176, 91 C. C. A. 210, 23 L. R. A. (N. S.) 722, that the Kentucky statute (Ky. St. 1903, § 656) which prohibits any life insurance company from making any distinction or discrimination between persons insured in the amount of premiums or rates charged to persons of the same class and equal expectation of life, etc., does not invalidate a policy because the agent returned to the insured a part of the first premium paid, which belonged to himself as a commission. Similarly, where an agent of an insurance company under contract to receive by way of salary a percentage upon the first

annual premiums paid upon all policies written by him tenders his own policy and is given his usual commission thereon, the law against discrimination against policy holders is not violated (*People v. Penn Mut. Life Ins. Co.*, 126 Ill. App. 279). And in *Julian v. Guarantee Life Ins. Co.*, 159 Ala. 533, 49 South. 234, the court held that a company issuing contracts providing for a special income in consideration of insured rendering on request services to the company, such as reporting on the fitness of agents or applicants for insurance, does not violate Code 1907, § 4579, prohibiting offering "to pay or allow, as inducement to insurance, any rebate of premiums"; for the services which insured obligates himself to perform afford a consideration for the obligation assumed to allow a special income, though the company has the option to demand the services—"rebate" being deductions from stipulated premiums allowed in pursuance of antecedent contract (citing 7 Words & Phrases, p. 5986). The circumstance of a life insurance company contemporaneously making an agency contract with, and issuing to, a person a life policy, the contract stipulating for payment to insured for services, not definitely mentioned except by reference to the application for such contract, not produced, of a percentage each year of the premiums received for insurance written, is not of itself sufficient to show with reasonable certainty that the purpose of the contract is to circumvent the statutory prohibition against rebating policy premiums (*McNaughton v. Des Moines Life Ins. Co.*, 140 Wis. 214, 122 N. W. 764).

On the other hand, a policy providing that, in consideration of the policy holder giving information as to insurance agents and risks, an annual income based on 1 per cent. of the amount of cash premiums taken in by the company in any one year would be given such policy holder, operates as an illegal discrimination, and is violative of Code Miss. 1906, § 2600, prohibiting any distinction or discrimination (*Cole v. State*, 91 Miss. 628, 45 South. 11). And in *People v. Commercial Life Ins. Co.*, 247 Ill. 92, 93 N. E. 90, it was held that a company which gives to an insured the option to purchase within a specified time shares of its stock for a specified price, lower than the market price, forming the main inducement for the taking of the policy silent as to his right to purchase stock, violates Act Ill. June 19, 1891 (Laws 1891, p. 148), prohibiting an insurance company from making any distinction or discrimination between insurance of the same class, and requiring the contract of insurance to be wholly expressed in the policy issued. So, too, it was held in

Smathers v. Bankers' Life Ins. Co., 151 N. C. 98, 65 S. E. 746, 18 Ann. Cas. 756, that a special agency contract executed by an insurance company to induce the writing of a life policy creating insured a member of a select body of policy holders within the state, not to exceed 300 in number, and agreeing to confer to them a property right in the funds of the company by means of which the annual premiums were to be reduced to such an extent, that in five or six years the policy would become self-sustaining merely in consideration of insured paying the premiums on the policy and sending to insurer annually, at its request, the names of 10 residents of his county whom he deems insurable, constituted an illegal discrimination in violation of Revisal 1908, § 4775, prohibiting insurance companies from discriminating against individual insureds of the same class in the granting of special favors as to dividends or other benefits. A mutual life policy, insuring certain persons called local inspectors, and agreeing, in consideration of their furnishing the company certain information, to divide an inspection fund among them, is invalid as discriminatory, in violation of Acts Ga. 1912, p. 129, § 20 (*Leonard v. American Life & Annuity Co.*, 77 S. E. 41, 139 Ga. 274). An agreement with an agent of the insurer that, if the insured will take the local agency of the company, the agent will write other insurance locally without the aid of insured and divide his commissions on same with insured, so as to provide for the payment of his premium notes, is a mere subterfuge, amounting to an illegal rebate (*Thomson v. McLaughlin*, 13 Ga. App. 334, 79 S. E. 182). Where defendant executed a note for the first premium, an agreement with an agent that defendant should not be required to pay the note if he would assist in procuring other insurance is an offer of rebate in violation of Rev. St. Tex. 1911, art. 4954 (*Security Life Ins. Co. of America v. Allen* [Tex. Civ. App.] 170 S. W. 131).

Act of insurance agent in buying drinks for parties he is soliciting is not violation of Anti-Rebate Law, where parties solicited are sober and mentally normal. *Northern Assur. Co. v. Meyer*, 194 Mich. 371, 160 N. W. 617.

Where an applicant for a life insurance policy, purchased stock in the company at the same time at a special price, but the transactions were entirely separate, the notes given in payment for the policy and the stock are not rendered void by Rem. & Bal. Code, §§ 6141, 6142, 6143, prohibiting an insurance company from discriminating in favor of individuals who are insureds of the same class. *First Nat. Life Assur. Society of America v. Farquhar*, 135 Pac. 619, 75 Wash. 687.

A licensed insurance agent engaging in negotiating loans does not violate Laws 1911, p. 195, § 33, prohibiting rebating, by obtaining from applicants for loans the exclusive right to write insurance (*Calvin Phillips & Co. v. Fishback*, 84 Wash. 124, 146 Pac. 181). But it is held in Pennsylvania that where a life insurance agent agrees with a person who has taken out insurance to repay the premium if the company does not make a mortgage loan to the insured within a time specified, the ratification of the contract by the company would not validate the contract, as it is founded on an illegal inducement prohibited by Act May 3, 1909 (*Mechling v. Philadelphia Life Ins. Co.*, 53 Pa. Super. Ct. 526).

A beneficiary clause attached to an accident policy is not void under Act May 3, 1909 (P. L. 405), prohibiting any bonus or rebate not specified as an inducement though a gross sum fixed as a premium for both risks was reduced after renewal by the amount of the premium for the beneficiary insurance. *Curran v. National Life Ins. Co. of United States*, 96 Atl. 1041, 251 Pa. 420.

1012 (d). While an executed agreement for rebating a premium renders the company liable to the statutory penalty, it does not make the policy void or voidable.

Meridian Life Ins. Co. v. Dean, 182 Ala. 127, 62 South. 90; *Id.*, 184 Ala. 673, 62 South. 94; *Robinson v. Security Life & Annuity Co.*, 79 S. E. 681, 163 N. C. 415; *McNaughton v. Des Moines Life Ins. Co.*, 140 Wis. 214, 122 N. W. 764.

But in *Equitable Trust Co. v. Newman*, 72 Misc. Rep. 52, 129 N. Y. Supp. 259, reversing 69 Misc. Rep. 494, 127 N. Y. Supp. 243, it was held that a contract to pay a certain amount as premium for a life policy, rebate of part of the premium being provided for, cannot be enforced; Insurance Law (Consol. Laws 1909, c. 28) § 89, prohibiting rebating, being in force when the contract was made, and giving rebates being made a misdemeanor by Laws 1889, c. 282 (now Penal Law [Consol. Laws 1909, c. 40] § 1191).

In *Rideout v. Maos*, 99 Miss. 199, 54 South. 801, 35 L. R. A. (N. S.) 485, Ann. Cas. 1913D, 770, it was held that under the Mississippi statute (Code 1906, § 2600) an agreement by an insurance agent, to induce defendant to accept a policy, to give him all of the first premium except \$300, claimed to be the amount of the company's share of such premium, was illegal, contrary to public policy, and without consideration; and hence, though the parties were in *pari delicto*, the agent's administrator was entitled to recover the balance of such premium. In *Urwan v. Northwestern Nat. Life Ins.*

Co., 125 Wis. 349, 103 N. W. 1102, the Wisconsin statute (Rev. St. 1898, § 1955o) was involved. The statute provides that no life insurance company shall make any discrimination in favor of individuals between insurants of the same class, and equal expectation of life, in the amount or payment of premiums, or in any other of the terms and conditions of the contract it makes, and that no such company or any agent thereof shall make any agreement as to such contract other than as plainly expressed in the policy, nor pay or allow as an inducement to insurance any rebate of premium or any special favor or valuable consideration whatever not specified in the policy. It was held that one to whom a special agent's contract, limited to 400 full members or proportionate number of half members in the state, is issued, in violation of the statute, as an inducement to the taking out of a policy of life insurance, is not in *pari delicto* with the insurer, and is not forbidden to prosecute an action against the insurer for return of money paid in consideration of the issuance of the policy.

It has been held in Illinois (*New York Life Ins. Co. v. People*, 95 Ill. App. 136, affirmed in 195 Ill. 430, 63 N. E. 264) that the company is liable for the penalty where the agent has granted rebates, though it never authorized or ratified the act of the agent. And to the same effect is *People v. American Life Ins. Co.*, 267 Ill. 504, 108 N. E. 679. The contrary rule prevails in Kentucky.

Equitable Life Assur. Soc. v. Commonwealth, 89 S. W. 537, 121 Ky. 543, 28 Ky. Law Rep. 333; *Id.*, 89 S. W. 538, 28 Ky. Law Rep. 550, 551; *Home Life Ins. Co. v. Same*, 89 S. W. 538, 28 Ky. Law Rep. 551; *United States Life Ins. Co. v. Commonwealth*, 90 S. W. 970, 28 Ky. Law Rep. 948.

For a discussion of questions of practice arising in actions involving violations of the anti-rebate laws, reference may be made to *Metropolitan Life Ins. Co. v. People*, 209 Ill. 42, 70 N. E. 643, affirming 106 Ill. App. 516; *People v. Mutual Life Ins. Co.*, 72 Ill. App. 569; *People v. Hartford Life Ins. Co.*, 252 Ill. 398, 96 N. E. 1049, 37 L. R. A. (N. S.) 778; *Dailey v. Chappell*, 31 Ohio Cir. Ct. R. 509.

7. RIGHTS AND LIABILITIES AS TO ASSESSMENTS—MUTUAL BENEFIT ASSOCIATIONS**1013-1015. (a) Nature or ground of obligation**

1013 (a). Though the premiums paid by insured constitute his consideration, and the risk assumed constitutes the insurer's consideration (National Council of Knights and Ladies of Security v. Garber, 154 N. W. 512, 131 Minn. 16). In the absence of an express promise to pay assessments, the member of a mutual benefit association cannot be held liable for assessments as on an implied promise to pay so as to render him a debtor to the association.

Supreme Lodge Knights of Honor v. Hahn, 43 Ind. App. 75, 84 N. E. 837; Faurot v. Swan, 155 Mich. 284, 118 N. W. 955; Russell v. O'Donoghue (C. C.) 178 Fed. 106. But see Bennett v. Beavers Reserve Fund Fraternity, 159 Wis. 145, 150 N. W. 181, holding that a member of a fraternal insurance association is absolutely liable for assessments accruing before forfeiture, though payable thereafter.

The waiver of a forfeiture of a mutual assessment insurance certificate for nonpayment of an assessment left the payment thereof still optional and did not render insured personally liable in violation of a provision of the by-laws that no personal liability would be incurred beyond the payment of guaranty notes (Mulherin v. Bankers' Life Ass'n, 163 Iowa, 740, 144 N. W. 1000).

1015-1019. (b) Liability to assessment

1015 (b). The liability of members of mutual benefit associations to assessments depends largely on the construction of the particular contract. The right to assess is to be strictly construed, and can be exercised only when the conditions prescribed in the contract exist (Wayland v. Western Life Indemnity Co., 166 Mo. App. 221, 148 S. W. 626). Thus a resolution of a mutual benefit society, that all new members should pay one advance mortuary assessment at the time of joining the order, did not require a member to keep one advance assessment continually paid up (Hetzl v. Knights and Ladies of Golden Precept, 106 N. W. 157, 129 Iowa, 655). So, if the constitution and by-laws of an assessment company, which also did an "old-line" insurance business, provide that no assessments should be levied so long as the money in the death fund would pay the maximum losses in full, an assessment, to meet

a deficiency in such fund which would not have existed but for the unauthorized payment of "old-line" losses out of it, was illegal.

Craig v. Western Life Ins. Co., 136 Mo. App. 5, 116 S. W. 1113; *Wayland v. Western Life Indemnity Co.*, 166 Mo. App. 221, 148 S. W. 626.

Where the constitution of a subordinate lodge provided that all powers not reserved to a superior lodge were given to it, such as creating its own by-laws, etc., and that every member should pay such benefits and dues as were stipulated by the by-laws; and at the organization of the lodge an oral motion was made and adopted fixing the amount of monthly dues, but this action was never recorded in the minutes or carried into the by-laws, it was held in *Haywood v. Grand Lodge of Texas*, K. P. (Tex. Civ. App.) 138 S. W. 1194, that the subordinate lodge could not require its members to pay any sums as monthly dues unless the amount should be stipulated in and fixed by the by-laws, and that the unrecorded proceeding fixing the monthly dues could not be regarded as a by-law.

On the other hand, where the constitution and laws of a fraternal benefit association provide that the members should pay one assessment per month unless certain officers decide it to be unnecessary, the payment of such assessment, when called, cannot be resisted on the ground that it was not lawfully made (*Sovereign Camp Woodmen of the World v. Ogden*, 107 N. W. 860, 76 Neb. 643). So, too, a policy, which provides for payments of fixed sums at stated intervals, and which authorizes assessments on persons holding similar contracts, if necessary, notifies the holder that he is amenable to assessments in addition to the regular payments as provided by the by-laws of insurer, and, though the policy does not in terms make the by-laws a part of the contract, the by-laws govern the levying of the necessary assessments (*Moran v. Franklin Life Ins. Co.*, 160 Mo. App. 407, 140 S. W. 955).

1016 (b). A member of a mutual benefit insurance association cannot be assessed for losses occurring prior to his membership, unless he agrees thereto (*Clark v. Iowa State Traveling Men's Ass'n*, 156 Iowa, 201, 135 N. W. 1114, 42 L. R. A. [N. S.] 631). So, where a benefit assessment was levied October 1st, and the constitution of the lodge provided that failure to pay the assessment before November 1st following required expulsion of the defaulting member, and the insured was admitted November 11th, and a certificate was issued November 30th, and received by him December

10th, he was not liable for the assessment of October 1st, where there was nothing in the constitution and rules requiring members admitted during the month to pay the assessment for that month (*Price v. Brotherhood of Railroad Trainmen*, 116 Minn. 275, 133 N. W. 793). If, however, one joining a beneficial association promises to pay assessments, but for default in making an assessment his rights are forfeited, he is liable for such assessment, but for none made thereafter (*Faurot v. Swan*, 155 Mich. 284, 118 N. W. 955).

1019-1024. (c) Power to change rate of assessment

1019 (c). Generally, if a member accepts a contract which provides that he shall comply with future as well as existing by-laws, he is bound by a reasonable by-law, subsequently passed, which increases his assessments.

United Benevolent Ass'n v. Cass, 54 Tex. Civ. App. 628, 119 S. W. 123. But see *Ericson v. Supreme Ruling of Fraternal Mystic Circle*, 105 Tex. 170, 146 S. W. 160, reversing (Tex. Civ. App.) 131 S. W. 92, and holding that the agreement to comply with future by-laws refers to regulations affecting the duties and conduct of the members as such.

1020 (c). If there is no provision in the articles of incorporation, constitution, or by-laws for rerating, and the policy, though written by an assessment company, calls only for stated premiums, the rates cannot be increased (*Green v. Security Mut. Life Ins. Co.*, 159 Mo. App. 277, 140 S. W. 325). And to the same effect is *Sauerbrunn v. Hartford Life Ins. Co.*, 143 N. Y. Supp. 1009, 159 App. Div. 121.

1021 (c). In view of the general principle that the increased rate must be reasonable, it has been held in many cases that the increased rates will be sustained when it appears that they are no higher than the exigencies of the business require to properly take care of the death losses as they occur.

Barrows v. Mutual Reserve Life Ins. Co., 81 C. C. A. 71, 151 Fed. 461; *Schmierer v. Mutual Reserve Fund Life Ass'n*, 153 Cal. 208, 94 Pac. 887, 16 L. R. A. (N. S.) 1047; *Kane v. Knights of Columbus*, 79 Atl. 63, 84 Conn. 96; *Reynolds v. Supreme Council Royal Arcanum*, 192 Mass. 150, 78 N. E. 129, 7 L. R. A. (N. S.) 1154, 7 Ann. Cas. 776; *Trisler v. Mutual Reserve Fund Life Ass'n*, 106 S. W. 1082, 128 Mo. App. 497; *Shepperd v. Bankers' Union of the World*, 77 Neb. 85, 108 N. W. 188. But see *Hicks v. Northwestern Aid Ass'n*, 117 Tenn. 203, 96 S. W. 962.

And for the purpose of attaining such result a classification of the members by age is proper.

Reynolds v. Supreme Lodge Royal Arcanum, 192 Mass. 150, 78 N. E. 129, 7 L. R. A. (N. S.) 1154, 7 Ann. Cas. 776; *Conner v. Supreme Commandery Golden Cross*, 117 Tenn. 549, 97 S. W. 306; *Trisler v. Mutual Reserve Fund Life Ass'n*, 128 Mo. App. 497, 106 S. W. 1082.

It has, however, been held in *Harrison v. Hartford Life Ins. Co.*, 63 Misc. Rep. 93, 118 N. Y. Supp. 401, affirmed in 137 App. Div. 918, 122 N. Y. Supp. 1130, that where a contract of insurance provides for assessments upon death upon surviving members according to graduated assessment rates as determined by the respective ages of the members and the number of certificates in force at insured's death, and the table of rates terminates at the age of 60 years with a maximum rate of \$2.68, the company cannot modify its contract so as to fix increased rates for subsequent insurance up to 65 years increasing the rate on the prior contract to a rate above \$2.68 after 60 years.

Of course, if the power to increase assessments is made dependent on the happening of certain emergencies, it must appear in order to sustain an increase in the rate of assessment that the contingency contemplated has arisen (*Hicks v. Northwestern Aid Ass'n*, 117 Tenn. 203, 96 S. W. 962). Thus in *Dresser v. Hartford Life Ins. Co.*, 80 Conn. 681, 70 Atl. 39, the application which by its terms was made a part of the contract obligated each member to pay "all mortuary calls determined as within set forth." Attached was a mortality table, showing the method of determining mortuary calls, in which the ratios were graduated according to the ages of the certificate holders for the assessment against each holder of a \$1,000 certificate for the collection of a death loss of \$1,000, the method being based on a minimum outstanding insurance of \$1,000,000. No other method for making mortality calls was provided in case the total outstanding insurance became less than \$1,000,000, and it was expressly stated that the ratios would decrease as the outstanding insurance increased. It was held that the company had no right to increase the rate of mortality calls beyond the amount so specified. So, too, in *Pearson v. Knight Templars' & Masons' Life Indemnity Ins. Co.*, 114 Mo. App. 283, 89 S. W. 588, it appeared that the constitution of the association made \$1,000 the unit of assessments. The association issued a policy for \$3,000 and "all money paid on the policy in assessments." It was held that assess-

ments paid in could not be assessed until they aggregated \$1,000, and the basis for levying assessments could not be again raised until a second \$1,000 had been paid in assessments.

1023 (c). In *Johnson v. Bankers' Union of the World*, 83 Neb. 48, 118 N. W. 1104, the facts were these: The constitution and by-laws of the society provided that, on a member's death, the amount due on his certificate should be ascertained by deducting from its face value the monthly assessments from his death to the expiration of his life expectancy, with 4 per cent. thereon. The constitution and by-laws were afterwards changed, increasing the monthly assessments, but providing that such increased assessments should be collected only from members thereafter joining, the old members to continue to pay at the old rate, and, on their death, the increase over the old rate to be deducted from their certificates. It was held that the society had the right in settling with the beneficiaries of a deceased member to deduct from the certificate the difference between the rate of the monthly assessments in force when the certificate was issued, and the increased rate provided by the amendment computed from the time when the new rate went into effect up to the member's death, but not for the balance of the life expectancy of such deceased member.

A member of a mutual benefit society is not barred by laches from restraining the society from increasing his monthly assessments by failure to sue to restrain the society for a few months after the increase had gone into effect, where he had regularly protested against the increase, as he has a new cause of action with every assessment demanded (*Green v. Supreme Council of Royal Arcanum* [Sup.] 124 N. Y. Supp. 398). In a suit by a member of a fraternal order to restrain the increase of dues the court will on motion for preliminary injunction permit the order to attempt to collect the increased dues, and, if paid, the excess must be credited to future accruing dues if complainant finally succeeds, or members may pay at the old rates and be given a reasonable opportunity to pay the increased rates if valid (*Poole v. Supreme Circle, Brotherhood of America* [N. J. Ch.] 85 Atl. 453).

1024-1027. (d) Power and duty to make assessments

1024 (d). The supreme body of a fraternal benefit association stands as the representative of all the members, and it owes the duty to them to require that assessments be paid by each member as the law of the order requires (*Supreme Lodge Knights of Honor*

v. Hahn, 43 Ind. App. 75, 84 N. E. 837). If an insurance company's charter intrusts all its affairs to a board of directors and the making of by-laws to the stockholders, its executive officers lack power to levy assessments unauthorized by the directors or the by-laws (Barber v. Hartford Life Ins. Co., 269 Mo. 21, 187 S. W. 867, and 187 S. W. 874).

The right of the association to assess its policy holders is strictly construed, and it can only be exercised when the conditions prescribed in the contract of insurance exist.

Chicago City Ry. Employees' Mut. Aid Ass'n v. Hogan, 124 Ill. App. 447; Illinois Commercial Men's Ass'n v. Perrin, 139 Ill. App. 543; Craig v. Western Life Ins. Co., 136 Mo. App. 5, 116 S. W. 1113. And see Johnson v. Hartford Life Ins. Co., 166 Mo. App. 261, 148 S. W. 631. But see Parker v. Sovereign Camp of Woodmen of the World (Mo. App.) 196 S. W. 424.

So, where the by-laws provide what funds shall be raised and how the dues and assessments shall be used, an emergency fund, not so provided for, is illegally created, unless the charter or by-laws are amended in the manner provided therein (Clark v. Iowa State Traveling Men's Ass'n, 156 Iowa, 201, 135 N. W. 1114, 42 L. R. A. [N. S.] 631). An insurance company has no right to make assessment for future death losses to provide mortality fund from which they might be paid, where policy does not confer that authority (Johnson v. Hartford Life Ins. Co., 271 Mo. 562, 197 S. W. 132). And it was held in Ibs v. Hartford Life Ins. Co., 121 Minn. 310, 141 N. W. 289, Ann. Cas. 1914C, 798, that an assessment nominally levied by a mutual benefit insurance company to pay specified accrued death claims was nevertheless illegal, when in reality it was levied to replenish a fund out of which to pay future losses.

1025 (d). In Whiting v. Fidelity Mut. Life Ass'n, 137 App. Div. 758, 122 N. Y. Supp. 1014, affirmed in 203 N. Y. 597, 96 N. E. 1134, it appeared that the scheme of insurance as outlined in a policy was to charge the insured so much for a mortality fund out of which death losses were to be paid, and so much for an equation fund, a surplus fund which could be used if there were a deficiency in the mortality fund, due to the increasing age of the member and if that became insufficient an assessment was to be made on 30 days' notice by the actuary on his determination that the amount of premiums in the policy were insufficient to cover the assured's share of the increasing mortality cost due to advancing age and the amount of deficiency properly chargeable to the member. The policy also

provided that, at the end of the estimated probable life of a member, he had the option to surrender the policy and receive a cash disability benefit. It was held, that the actuary had not power to arbitrarily determine that there was a deficiency in the equation fund, contrary to the fact, so as to authorize an assessment.

1026 (d). Where an old line insurance company reinsures the business of an assessment insurance company and assumes the outstanding policy contracts and all obligations of policy holders and beneficiaries thereunder, and issues to policy holders a certificate reciting that it assumes the insurance under the terms and conditions of the policies, the contract is not changed from an assessment contract to an old line policy, though the old line company has no authority to levy assessments, since the assessment insurance company could still do so, or a court of equity could order the levy of assessments (*Moran v. Franklin Life Ins. Co.*, 160 Mo. App. 407, 140 S. W. 955).

1028-1030. (f) Notice of assessment

1028 (f). Where a beneficial association is given the right to levy assessments with no definite time fixed for their payment, the levy does not become binding upon the assured, or affect any right which he possesses under the policy until notice has been given of an assessment which it is claimed creates the liability or destroys the right (*Federal Life Ins. Co. v. Risinger*, 46 Ind. App. 146, 91 N. E. 533).

1030 (f). Notice may of course be given by mail. If the policy and papers connected therewith show the residence and post office address of the insured to be at a certain place, and the by-laws show that the notices were to be mailed to a member at his post office address, and there is no proof that he ever gave notice of any change of address, the mere fact that he was at times at other places and received mail there, did not authorize the company to send notices of assessments there (*Mutual Life Industrial Ass'n of Georgia v. Scott*, 170 Ala. 420, 54 South. 182). If the policy provided that the secretary should notify insured by ordinary mail, notice was not given when letter containing information as to assessment was deposited by insurer in mails irrespective of whether the notice was received (*United Assur. Ass'n v. Frederick* [Ark.] 195 S. W. 691). So, too, notice may be given, through the official paper of the association and, in the absence of a designated time when such paper should be sent to its members, the law requires that the same shall be mailed

within a reasonable time, and the fourth day of the month of the paper's publication fulfilled such requirement (*Scheiber v. Protected Home Circle*, 146 Ill. App. 574).

Where voluntary association's law required president to give written notice of death assessment, failure of plaintiff's decedent to pay assessment not so ordered, but made by financial secretary on his own motion, does not forfeit decedent's membership. *Zender v. Detroit Lodge No. 1 of Knights of Royal Ark*, 190 Mich. 624, 157 N. W. 361.

Sufficiency of notice see *Mulherin v. Bankers' Life Ass'n*, 163 Iowa, 740, 144 N. W. 1000.

1030-1033. (g) Levy of assessment

1031 (g). If the policy provides that the rate of assessment shall be fixed by the board of directors of the company, the fact that the executive committee take part with such board in fixing assessments does not render the same illegal (*Barrows v. Mutual Reserve Life Ins. Co.*, 151 Fed. 461, 81 C. C. A. 71).

Assessments levied by letters written by members of committee are illegal and nonenforceable. *International Brotherhood of Maintenance of Way Employés v. Duncan* (Tex. Civ. App.) 194 S. W. 956.

1033-1034. (h) Waiver of objections to assessment

1033 (h). There can be no acquiescence by a member of a mutual benefit insurance association respecting his rights, unless he acts with full knowledge; nor will the doctrine be applied to aid a forfeiture where an illegal exaction has been made (*Clark v. Iowa State Traveling Men's Ass'n*, 156 Iowa, 201, 135 N. W. 1114, 42 L. R. A. [N. S.] 631). And it has been held generally that the fact that a mutual benefit certificate holder pays illegal assessments does not estop him or his beneficiary from questioning the legality of subsequent similar assessments.

Benjamin v. Mutual Reserve Fund Life Ass'n, 79 Pac. 517, 146 Cal. 84; *Supreme Council Catholic Knights of America v. Logsdon*, 183 Ind. 183, 108 N. E. 587; *Gibson v. Iowa Legion of Honor* (Iowa) 159 N. W. 639; *Supreme Council Catholic Knights of America v. Fenwick*, 183 S. W. 906, 169 Ky. 269; *Supreme Lodge K. P. v. Mims* (Tex. Civ. App.) 167 S. W. 835.

But in *Kane v. Knights of Columbus*, 84 Conn. 96, 79 Atl. 63, a contrary view was taken, and it was held that where a mutual benefit society adopted a separate plan of assessment by amendment to its by-laws prior to January, 1902, and complainants for several years thereafter continued their membership, actively shared

in the plan of insurance, and did nothing in denial except to enter an occasional protest for the society's failure to apportion certain reserve funds in reduction of assessments, they were estopped by laches to invoke the aid of equity to invalidate such plan of assessment.

Naturally a member may be estopped by a practical construction of the contract. Thus, in *Hoover v. Bankers' Life Ass'n*, 155 Iowa, 322, 136 N. W. 117, it was held that, where a certificate of membership calling for quarterly payments issued by an assessment insurance association, was delivered to insured in May, and an assessment, levied in October, was paid by him, the parties placed a practical construction on the contract to the effect that it was valid from the date of its delivery in May; and hence the October assessment was legally levied.

1035-1037. (1) Actions to recover assessments

1037 (i). If a mutual benefit association issues a policy and accepts a note for the premium, it is no defense, in an action on the note, that the maker never had an opportunity to be initiated into a subordinate lodge (*Brown v. Bowman*, 10 Ga. App. 707, 73 S. E. 1078).

8. RECOVERY OF PREMIUMS PAID IN GENERAL

1037-1039. (a) Circumstances authorizing recovery in general

1037 (a). If the agent of the insurer has collected from the insured premiums that he is liable to pay, the insured may recover such payments from the company, though it had not authorized or participated in the agent's conduct (*New England Mut. Life Ins. Co. v. Swain*, 100 Md. 558, 60 Atl. 469). But where a rejected applicant for insurance who had given the agent his note for the first premium allowed the agent to apply to another company for insurance, such conduct of insured did not cancel the first company's debt for the money received by its agent (*Reserve Loan Life Ins. Co. v. Benson* [Tex. Civ. App.] 167 S. W. 266). In *Morris & Co. v. Starkweather & Shepley*, 186 Ill. App. 59, which was an action by several plaintiffs to recover a sum alleged to have been paid by plaintiffs to defendant as premiums due on certain fire insurance, it was alleged that defendant agreed to procure the insurance for plaintiffs in certain companies, but that it procured the insurance in such companies and another company in violation of the agree-

ment. It was held that a judgment for plaintiffs could not be sustained; it appearing that a certain brokerage company to whom the money was paid was the agent of the plaintiffs to procure the insurance, and that such company prior to the time the policies were issued, and prior to the time the premium was paid, was informed of the names of the companies that had issued the insurance.

The rule that the applicant for insurance is entitled to recover the premium paid if the policy was never issued and delivered is of course fundamental; the question being merely whether the rule is applicable to the facts of the particular case. The insurer cannot retain the premiums where the contract never went into effect, unless it was prevented from going into effect by intentional fraud of insured (*National Council of Knights and Ladies of Security v. Garber*, 154 N. W. 512, 131 Minn. 16). So, where a policy was void because the minds of the parties never met as to the house to be insured, so that there was no consideration for the premium paid, the insured was entitled to recover that amount with interest from the date of its payment (*Dixie Fire Ins. Co. v. Wallace*, 156 S. W. 140, 153 Ky. 677, Ann. Cas. 1915C, 409). But an applicant for a life insurance cannot recover an advanced premium, where he has refused to submit to a medical examination provided for by the application and requested by the company, unless the contract has been rescinded (*Witt v. Old Line Bankers' Life Ins. Co.*, 144 N. W. 801, 94 Neb. 748). If a person paid a first premium to another whom he had authorized to secure life insurance, and the application was rejected by the company, such other person not being an agent thereof, the person paying the premium could not recover the money from the company if it had not received the money and had no knowledge of it; but, if it received the money, or had knowledge of its payment and acted upon the application, it would make the person receiving the premium its agent by ratification, and would be liable for the money (*Michigan Mut. Life Ins. Co. v. Thompson*, 44 Ind. App. 180, 86 N. E. 503). It has, moreover, been held in *Hall v. Prudential Ins. Co. of America*, 72 Misc. Rep. 525, 130 N. Y. Supp. 355, that premiums voluntarily paid cannot be recovered on the theory that the policy was never delivered, if the insurer did not know such to be the fact and acted in good faith, and had by its conduct become estopped to deny its liability on the policy.

Voluntary payments of premiums by one not a beneficiary cannot be recovered. *Lawson v. United Benef. Ass'n* (Tex. Civ. App.) 185 S. W. 976.

1038 (a). If the policy issued is not as agreed, and is, therefore, unsatisfactory to the insured, the premium may be recovered.

International Life Ins. Co. v. Nix, 11 Ga. App. 664, 75 S. E. 1058; *Prince v. State Mut. Life Ins. Co.*, 57 S. E. 766, 77 S. C. 187; *Security Life Ins. Co. v. Stephenson* (Tex. Civ. App.) 136 S. W. 1137; *Mutual Life Ins. Co. v. Summers*, 19 Wyo. 441, 120 Pac. 185.

If an insured disappeared and his beneficiary continued paying premiums on his life policy for seven years from his disappearance, she could recover such premiums, with interest thereon from date of their payment respectively if it was shown he died on date of his disappearance (*Equitable Life Assur. Soc. v. Brame*, 112 Miss. 859, 73 South. 812).

Where a fraternal benefit association exacted illegal assessments which insured paid believing them authorized, the beneficiary was entitled to recover the excess of the illegal over the legal assessments, after deducting sufficient to pay all legal assessments and continue the certificate to insured's death (*Supreme Council Catholic Knights of America v. Fenwick*, 183 S. W. 906, 169 Ky. 269). But an insured, who, under protest, paid excessive premiums on his life policy voluntarily and without fraud or duress, cannot recover the excess (*Rosenfeld v. Boston Mut. Life Ins. Co.*, 110 N. E. 304, 222 Mass. 284).

If the insured was older than the maximum age at the time he applied for his certificate and membership, the only remedy which his beneficiary might enforce against the insurer would be to recover back the money the insured had paid for insurance (*Tuite v. Supreme Forest Woodmen Circle*, 187 S. W. 137, 193 Mo. App. 619).

Plaintiff, a member of a fraternal order, is not entitled to return of premiums paid in before the society discovered that he had misstated his age. *Criscuolo v. Societa Monarchica Di Mutuo Soccorso Vittoria Emanuele III*, 89 Conn. 249, 93 Atl. 532.

An action against a life insurance company to recover the amount of a premium note wherein it is alleged that such note was delivered to defendant's agent on the promise of such agent that the note should be surrendered to plaintiff in case he declined to receive a policy for which he had applied, and that such agent fraudulently negotiated the note to an innocent purchaser, must be regarded as seeking rescission of the contract of insurance, and not damages, though the complaint does not pray for rescission; and hence plaintiff may obtain rescission on account of such fraud,

though defendant did not authorize its agent to make the representations, and hence could not be held to respond in damages (*Mutual Reserve Life Ins. Co. v. Seidel*, 52 Tex. Civ. App. 278, 113 S. W. 945). Where defendant insurance company agreed with the plaintiffs to insure them for 20 years at a certain rate, and to allow them to earn a whole or part of their premiums by aiding an agent to be furnished by defendant in securing others to take out insurance, the contract was not a severable one, and the violation of any part was a violation of the whole, so that the failure of the company to furnish the agent or to give the plaintiffs an opportunity to earn a part of their premiums was a breach of the contract, which entitled them to recover the premiums paid (*Robertson v. Covenant Mut. Life Ins. Co.*, 123 Mo. App. 238, 100 S. W. 686).

In *Germania Life Ins. Co. v. Bouldin*, 100 Miss. 660, 56 South. 609, the facts were these: The company forwarded a policy to its agent, with instructions to deliver it to insured, who accepted the policy without notice that a rider, placed thereon by the agent, was not placed there by the company. Shortly before the expiration of the tontine period, insured demanded settlement in accordance with the terms of the rider, while the company relied on the printed terms of the policy, and showed that the rider had been placed on the policy by its agent without authority. It was held that the court, in a suit by insured to compel the company to perform the contract as disclosed by the rider, or for a decree against insurer for all premiums paid, could not enter a decree for insured for the premiums since insured, suing in equity, must do equity, and since it would be inequitable to require the company to refund the premiums, while it was bound for the full amount of the policy in case insured had died during the life of the policy.

In *Jackson v. Security Mut. Life Ins. Co.*, 233 Ill. 161, 84 N. E. 198, affirming 135 Ill. App. 86, it was held that, though plaintiff's husband paid the first premium on a policy sued on, in part by giving the insurer's local agent his I. O. U. for \$409.68, and the agent paid the insurance company the premium in full at the rate of a receipt executed therefor, the obligation of the husband to take up the indebtedness to the agent was one in which the insurance company was not concerned, so that the beneficiary, having paid the agent, was not entitled to claim that the insurance company had been twice paid.

1039 (a). A premium paid under mistake of law is, of course, not recoverable (*Maryland Casualty Co. v. Little Rock Ry. & Elec-*

tric Co., 92 Ark. 306, 122 S. W. 994), though recovery may be had where the payment is made under mistake of fact. Thus, in *Hopkins v. Northwestern Nat. Life Ins. Co.*, 41 Wash. 592, 83 Pac. 1019, it was held that where, after insured has become entitled under his policy to payment of an endowment, he being inexperienced in business, continues to make payments of premiums, relying on the representations of the insurer that it was necessary to keep the policy alive while funds for payment of the endowment were being raised, he may recover them as payments made under a mistake of material facts.

In a suit against an insurance company for an accounting if there has been no rescission of the contract of insurance, and no offer or apparent intention on the part of either party to rescind it, a forfeiture of moneys lawfully received by the insurance company from the certificate holders will not be declared. *Dresser v. Hartford Life Ins. Co.*, 70 Atl. 39, 80 Conn. 681.

The mere fact that the company had, without plaintiff's consent, transferred, on its books or elsewhere, her interest in a policy to some other person, does not constitute the basis of an action for the return of the premium (*Lewis v. London & Lancashire Fire Ins. Co.*, 137 N. Y. Supp. 887, 78 Misc. Rep. 176).

1039-1040. (b) Fraud of company or agent

1039 (a). Where one, by the fraud or misrepresentation of the company or its agent, is induced to take a policy of insurance, he may rescind on discovery of the fraud and recover the premiums.

Evans v. Central Life Ins. Co., 125 Pac. 86, 87 Kan. 641, 41 L. R. A. (N. S.) 1130; *Provident Savings Life Assur. Soc. of New York v. Shearer*, 151 Ky. 298, 151 S. W. 938; *Moore v. Mutual Reserve Fund Life Ass'n*, 106 N. Y. Supp. 255, 121 App. Div. 335; *Caldwell v. Life Ins. Co. of Virginia*, 52 S. E. 252, 140 N. C. 100; *Provident Savings Loan Assur. Co. v. Statler*, 34 Ohio Cir. Ct. R. 391, judgment affirmed 106 N. E. 1073, 88 Ohio St. 549; *Mutual Reserve Life Ins. Co. v. Seldel*, 52 Tex. Civ. App. 278, 113 S. W. 945; *Urwan v. Northwestern Nat. Life Ins. Co.*, 108 N. W. 1102, 125 Wis. 349.

The fraudulent acts of an alleged insurance agent in procuring an application and note for insurance are not ratified by the conduct of an insurance company, where it had no knowledge of the fraud until long after the application had been rejected. *Weldenaar v. New York Life Ins. Co.*, 94 Pac. 1, 36 Mont. 592.

The false representations must, of course, have been relied on by the applicant (*Frazell v. Life Ins. Co. of Virginia*, 153 N. C. 60, 68 S. E. 912), and it must appear that he had a right to rely on

them. Thus, where the premiums were paid on the alleged fraudulent representations of the agents of the company that the policies should contain a provision that, at the end of 10 years, the beneficiaries should be paid the face value of the policies or the amount of premiums paid, with 4 per cent. interest, and plaintiff testified that he could read, and that he had read the policies, he was not entitled to recover, if the policies contained no such provisions (*Cathcart v. Life Ins. Co. of Virginia*, 57 S. E. 390, 144 N. C. 623). So, too, it was held in *Dickinson v. National Life & Trust Co.*, 20 S. D. 437, 107 N. W. 537, that if the state agent, in order to procure the application of a physician for life insurance, executed a writing certifying that the physician was to examine applicants for the company to the amount of the premium on his policy, in consideration of which the physician had given his notes, the writing being signed individually by the agent, but no persons were brought to the physician for examination, and he was compelled to pay the full amount of the notes to indorsees thereof, he could not recover the amount so paid from the company, where the agent had no authority to execute the writing described, and where the application for the policy stated that no statements, promises, or information given by the person soliciting the application should be binding on the company unless reduced to writing and presented to its officers at the home office. Where the soliciting agent of a life insurance company, without authority, induced certain persons to apply for life insurance, and pay the first premium, through his representations that the premiums would be returned if the loans applied for were not made, the company upon failure to make the loans was not liable for the return of the premiums (*Burns & Reilly Real Estate Co. v. Philadelphia Life Ins. Co.*, 86 Atl. 642, 239 Pa. 22).

Where the giving of a note for premiums or the payment of premiums is induced by the fraud or false representations, the amount paid in consequence thereof may be recovered.

Stroud v. Life Ins. Co. of Virginia, 148 N. C. 54, 61 S. E. 626; *Mutual Reserve Life Ins. Co. v. Seidel*, 52 Tex. Civ. App. 278, 113 S. W. 945; *Hopkins v. Northwestern Nat. Life Ins. Co.*, 41 Wash. 592, 83 Pac. 1019.

Thus in *Hopkins v. Northwestern Nat. Life Ins. Co.*, 41 Wash. 592, 83 Pac. 1019, it was held that where insured at the time provided by his policy surrenders it, and demands payment of the \$1,000 endowment to which he is then entitled under the policy, but the

company returns it, and requests him to keep it till notified by it that a sum has been raised for payment of the endowment, and it never gives him such notice, but for two years demands payments of him of premiums, which insured in his ignorance makes on its representation that they are necessary to keep the policy alive, the company is estopped to claim that later payments of premiums made after demands therefor had ceased, were not made by reason of such representations.

One seeking to recover on the ground of fraud must, however, act promptly on discovery of the fraud. So, where one agreed to pay the premiums on a policy issued on the life of another on the representation that she was the beneficiary in the policy, and she actually paid the premiums, and she had actual notice at least a year before the death of insured that the policy did not name her as beneficiary, her delay until after the death of insured and the absconding of the agent who had made the misrepresentations before asserting her interest in the policy as against insurer, and her act in allowing the policy to go into the hands of the administrator of insured, who was by the terms thereof lawfully entitled to the payment thereof, defeated her right to rescind the transaction and recover from insured the premiums paid (*Monast v. Manhattan Life Ins. Co.*, 79 Atl. 932, 32 R. I. 557).

1040-1041. (c) Void and voidable policies

1040 (c). Though it is a general rule that illegal contracts are void, unless a statute prohibiting the giving of rebates for premiums, declares the policy to be void by reason of the illegal agreement, the insured cannot recover back premiums paid in such cases.

Commonwealth Life Ins. Co. of Louisville v. Bowling (Ky.) 114 S. W. 327; *Laun v. Pacific Mut. Life Ins. Co. of California*, 111 N. W. 660, 131 Wis. 555, 9 L. R. A. (N. S.) 1204.

Where an insurance policy is by its terms void for fraud of insured, the premium cannot be recovered by him (*National Mut. Fire Ins. Co. v. Duncan*, 44 Colo. 472, 98 Pac. 634, 20 L. R. A. [N. S.] 340). If, however, the policy is void from the beginning, and there is no fraud on the part of the insured, he may recover the premiums paid by him (*Seaback v. Metropolitan Life Ins. Co.*, 113 N. E. 862, 274 Ill. 516, affirming judgment *Sulski v. Same*, 196 Ill. App. 76). So, where a member is admitted to a fraternal benefit society who is past the age prescribed by the certificate of incorporation for admission to membership and the society accepts

dues and assessments from such member for many years after the issuance of the benefit certificate, such dues and assessments must be returned on refusal of the society to pay the amount of the benefit certificate (*Sowersby v. Royal League*, 159 Ill. App. 626).

1041-1042. (d) Same—Policies taken without knowledge of person insured

1041 (d). Though life insurance policies taken without the knowledge or consent of the insured are void, premiums paid thereon in good faith may be recovered (*Griffin's Adm'r v. Equitable Assur. Soc.*, 84 S. W. 1164, 119 Ky. 856, 27 Ky. Law Rep. 313). So it was held in *Mahoney v. Metropolitan Life Ins. Co.*, 80 N. J. Law, 136, 76 Atl. 458, that where a wife, without her husband's knowledge or consent, procured a policy on his life for her benefit, which was void because the application was not signed by the person whose life was insured as therein provided, and the premiums were paid sometimes by the wife and sometimes by the husband, but always with his money, and under an honest belief, upon his part, that the policies insured the life of the wife, he could, upon discovering the mistake and repudiating the policies, recover from the insurer the money paid.

Though it has been held in some cases that the objection may be waived by the insurer thus preventing recovery, that does not seem to be the doctrine in Ohio. It was held in *Metropolitan Life Ins. Co. v. Felix*, 73 Ohio St. 46, 75 N. E. 941, 4 Ann. Cas. 121, that in an action to recover premiums paid to an insurer on a life insurance policy which was void under its terms because the insured was not aware of the insurance, the rights of the parties at the beginning of the action should determine the judgment, and the insurer cannot by averments in its answer, effectively waive such defense to the policy.

1042-1043. (e) Same—Defect in insurable interest

1043 (e). One paying the premiums on a life policy cannot recover them, on the ground that the policy was void for lack of insurable interest, unless it clearly appears that he was innocent of any wrong himself in taking out such policy (*American Mut. Life Ins. Co. v. Mead*, 39 Ind. App. 215, 79 N. E. 526). But where a school district to secure bonds entered into unlawful contracts for policies on the lives of persons on which it had no insurable interest, it cannot, having been required to pay notes given for the premiums recover the amounts back from the insurer (*Security*

Mut. Life Ins. Co. v. Little, 119 Ark. 498, 178 S. W. 418, L. R. A. 1917A, 475).

Where decedent and her husband voluntarily paid premiums to defendant on a policy on the life of E., in which they had no insurable interest, there could be no presumption of fraud on the part of defendant's agents, or mistake on the part of decedent and her husband, sufficient to justify a recovery of the premiums as money received to their use; it not appearing that the policy was void at all events (Hall v. Prudential Ins. Co. of America, 130 N. Y. Supp. 355, 72 Misc. Rep. 525).

One named a beneficiary in a life insurance policy who had no insurable interest in the insured is not entitled to receive back premiums paid by him, such payments being considered as made as agent and being due to the estate of the insured, if returned. Dresen v. Metropolitan Life Ins. Co., 195 Ill. App. 292.

1043-1044. (f) Failure of risk to attach

1043 (f). On the theory that, if the risk does not attach, the insured may recover the premium paid, it was held, in Mutual Reserve Life Ins. Co. v. Seidel, 52 Tex. Civ. App. 278, 113 S. W. 945, that where an applicant for a life insurance policy gave the agent of the insurer his note in payment of the first year's premium on a promise by the agent that the note should be returned in case the applicant should not accept the policy, there was no completed contract, and, where the agent wrongfully negotiated the note to an innocent purchaser before the policy was accepted, the applicant was entitled to recover the amount of the note from the insurance company on his refusal to receive the policy. Where a person to whom a beneficiary certificate had been issued but not delivered died before his initiation, and no administrator was appointed, a tender into court of the initiation fee by the association after the refusal of the beneficiary to accept is a sufficient offer to return the fee to relieve the association from liability (Porter v. Loyal Americans of the Republic, 167 S. W. 578, 180 Mo. App. 538).

The South Dakota Statute (Civ. Code, §§ 1862, 1863), providing that insured is entitled to a return of the premium paid, if the company has incurred no liability under the policy for which the premium was paid, is declaratory of the common-law rule. Grabinski v. United States Annuity & Life Ins. Co., 33 S. D. 300, 145 N. W. 553.

Where a marine policy delivered did not cover the risk stipulated for in a prior oral contract of insurance, plaintiff was entitled to sue on the oral contract, or have the policy reformed, and was

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therefore not entitled to recover part of the premium on the theory of partial failure of consideration (*International Ferry Co. v. American Fidelity Co.*, 101 N. E. 160, 207 N. Y. 350, reversing judgment 129 N. Y. Supp. 1129, 145 App. Div. 906).

1045-1048. (g) Termination of risk—Forfeiture or cancellation

1045 (g). Where a contract of fire insurance was entire, and the risk had attached, the premium was not apportionable, and the insurer was not required to tender any part of the premium upon claiming a forfeiture (*Home Ins. Co. of New York v. Myers*, 111 S. W. 289, 33 Ky. Law Rep. 790, denying rehearing of 107 S. W. 719).

There can be no recovery of premium on forfeiture of policy for breach of warranty or misrepresentation. *Plummer v. Insurance Co. of North America*, 95 Atl. 605, 114 Me. 128; *Elder v. Federal Ins. Co.*, 100 N. E. 655, 213 Mass. 389.

Where an insurance policy provided that it should be void if the premises remained vacant for 10 days, and that in such case the unearned premium should be returned, the insurer was not bound to return any unearned premium, unless the policy be surrendered. *Schmidt v. Williamsburgh City Fire Ins. Co. of Brooklyn*, N. Y., 95 Neb. 43, 144 N. W. 1044, 51 L. R. A. (N. S.) 261.

1047 (g). In *Marrian v. Robbins*, 102 App. Div. 214, 92 N. Y. Supp. 654, it appeared that plaintiff applied to defendant, an insurance agent, for insurance on his property. Defendant, not being authorized to issue insurance in the territory in which the property was situated, obtained a policy from D., an agent in that territory. Plaintiff paid the premium to defendant, who paid same to D.; but D. failed to report same to the company, and the policy was canceled. It was held that defendant was agent for plaintiff, and not for the insurance company, and was not liable to plaintiff for the premium unless he acted negligently or fraudulently.

Where the risk attached under a surety bond of a county trustee for one year, the administratrix of the trustee dying after six months could not recover back half of advance premium. *Crouch v. Southern Surety Co.*, 131 Tenn. 260, 174 S. W. 1116, Ann. Cas. 1916C, 1220.

The general principle that the insolvency of the insurance company operates as a cancellation of the policy, entitling the insured to a return of the unearned premium, is discussed in the original text. It is to be noted, however, that in the case of mutual assessment companies leaving no capital stock, the policy holders are

the stockholders, and the cash paid in and the premium notes constitute the company's assets; and hence, upon the insolvency of such company, a policy holder cannot recover premiums paid in or avoid premium notes (*Gleason v. Prudential Fire Ins. Co.*, 127 Tenn. 8, 151 S. W. 1030). On the other hand, where a mutual fire insurance company was authorized to issue cash premium policies which provided for cancellation and a retention of the pro rata premium, the unearned premiums on such policies, when the company passed into the hands of a receiver, were a part of its liabilities (*Ely v. Oakland Circuit Judge*, 162 Mich. 466, 125 N. W. 375, order modified on rehearing 162 Mich. 466, 127 N. W. 769).

The holder of a policy of insurance issued by a title insurance company is, on cancellation of the policy by a decree declaring the company insolvent and appointing a receiver, entitled to a return of a proportionate part of the premium paid, measured by the time elapsing between the date of the policy and the date the company was adjudged insolvent (*State ex rel. Schaefer v. Minnesota Title Ins. & Trust Co.*, 116 N. W. 944, 104 Minn. 447, 19 L. R. A. [N. S.] 639, 124 Am. St. Rep. 633).

To the same effect, see *Johnson v. Button*, 120 Va. 339, 91 S. E. 151.

1048-1049. (h) Same—Life policies

1048 (h). Though the general principle that a valid forfeiture of a life policy will not justify a recovery of the premium paid, in the absence of an agreement giving insured such a right, is supported in most jurisdictions, Indiana has apparently taken the contrary view, and has held that even in the case of forfeiture for breach of conditions the company must return or tender the premium paid.

Ætna Life Ins. Co. v. Bockting, 39 Ind. App. 586, 79 N. E. 524; *United States Health & Accident Ins. Co. v. Clark*, 41 Ind. App. 345, 83 N. E. 760; *American Cent. Life Ins. Co. v. Rosenstein*, 46 Ind. App. 537, 92 N. E. 380, affirming 88 N. E. 97, on rehearing; *Metropolitan Life Ins. Co. v. Johnson*, 49 Ind. App. 233, 94 N. E. 785. And see *Royal Neighbors of America v. Spore*, 169 S. W. 984, 160 Ky. 572. But see *Waltz v. Workmen's Sick and Death Benefit Fund of the United States of America* (Sup.) 141 N. Y. Supp. 578, reversing judgment 139 N. Y. Supp. 1016, 78 Misc. Rep. 499; *Elliott v. Knights of the Modern Maccabees*, 46 Wash. 320, 89 Pac. 929, 13 L. R. A. (N. S.) 856.

Where policy provided that though agent failed to call for dues, policy holder should remit premiums to nearest office or forfeit

those paid, policy holder, not having paid premiums for which agent did not call, cannot, forfeiture having been declared, recover premiums already paid (*Favors v. Bankers' Health & Life Ins. Co.*, 89 S. E. 1048, 18 Ga. App. 522). Where the policy provided that it should be void for suicide within one year, and insured committed suicide during latter part of first quarter, the return or tender of any portion of premium paid in advance for one year is not prerequisite to defense, although premium was only required in advance for quarter (*Ætna Life Ins. Co. of Hartford, Conn., v. Doerr* [Ind. App.] 115 N. E. 700).

One whose name is stricken from the membership roll of a fraternal life insurance company, on discovery that he was over the age limit when admitted, cannot recover dues and assessments paid, as for failure of consideration, the payments being for the social features, as well as for compensation for individual losses, and he having had the enjoyment of the social benefits (*Currier v. Catholic Order of Foresters*, 87 Vt. 83, 88 Atl. 525). Where the beneficiary in a policy of fraternal insurance on the life of her husband assumed payment of premiums at the time of a divorce, and paid premiums until policy was canceled upon rightful withdrawal of insured from membership, moneys received by the order are earned premiums upon a valid contract of insurance, which beneficiary had no right of action against order to recover (*Somo v. Supreme Court I. O. F.*, 83 Or. 654, 164 Pac. 187). If insured did not promptly notify a mutual company of his election to rescind, and, subsequent assessments being unpaid, insured's interest as a member was distributed among other members, on his death dues and premiums already paid cannot be recovered (*West End Trust Co. v. Fidelity Mut. Life Ins. Co.*, 98 Atl. 768, 253 Pa. 619).

Where an insurance company issued a policy for less than the regular premium to plaintiff, who paid the specified premiums for a number of years, when the insurance company canceled the policy as violative of Revisal 1905, § 4775, the parties were not in *pari delicto*, and plaintiff was entitled to recover premiums paid as money received to his use (*Robinson v. Security Life & Annuity Co.*, 79 S. E. 681, 163 N. C. 415).

Where a life policy was void ab initio, the premiums paid, with interest thereon, were the measure of damages on cancellation. *Supreme Lodge Knights of Pythias v. Neeley* (Tex. Civ. App.) 135 S. W. 1046.

The insurer's return of a check for a past-due premium on a continuous contract of insurance, and its declaration that the policy was void, does not preclude the insured from recovering such previously paid premiums (*Titlow v. Reliance Life Ins. Co.*, 246 Pa. 503, 92 Atl. 747).

1049-1050. (1) Questions of practice

1049 (i). In an action to recover money paid under a policy of insurance which was void ab initio, it was unnecessary to make the contract a part of the complaint, since it was not the foundation of the action (*American Mut. Life Ins. Co. v. Mead*, 39 Ind. App. 215, 79 N. E. 526).

1050 (i). In an action to recover an amount paid as insurance premiums on the ground of false representations which induced plaintiff to take out the policy, a charge to the effect that, if plaintiff paid the premiums after having ascertained that the policy was not what she contracted for, she could not raise the question of fraud unless she paid the premiums under protest, was not erroneous, as not based on the evidence, where there was evidence that when plaintiff first learned that there was something wrong with her policy she endeavored without success to have the matter adjusted, and went from one agent to another in her efforts to obtain satisfaction until her policy was finally canceled (*Caldwell v. Life Ins. Co. of Virginia*, 52 S. E. 252, 140 N. C. 100).

In an action against an insurance company for damages from the fraud of an agent for collecting a premium not due, the court instructed that if the agent in question was a duly authorized agent to solicit insurance, and after having collected the premium he falsely and fraudulently represented that another premium was due, when in fact the second premium was not due, etc., the verdict must be for plaintiff. Held, that the instruction was erroneous, in that it did not require the jury to determine whether the agent was acting within the scope of his employment in collecting the second premium (*New England Mut. Life Ins. Co. v. Swain*, 60 Atl. 469, 100 Md. 558).

Where an application for a policy of life insurance and also an application for a special agent's contract were executed by the applicant on the same day at the solicitation of an agent of the insurer, and, in order to make the appointment as special agent effectual, the applicant was required to continue the payment of premiums on the policy for the full term, and he was induced to

pay the first year's premium on the policy to secure the special agent's contract as well as the policy, the two contracts, though separate in form, must be considered together to determine the character of the transaction, and the intention of the parties in in an action for return of the premium paid on the policy at the time of making the applications (*Urwan v. Northwestern Nat. Life Ins. Co.*, 103 N. W. 1102, 125 Wis. 349).

There being evidence that the policy described in plaintiff's application was not delivered to or accepted by him, and that the policy actually tendered was for a different sum and of a different kind, and was never accepted, a verdict against the insurer for the premium paid was authorized (*International Life Ins. Co. v. Nix*, 75 S. E. 1058, 11 Ga. App. 664).

9. RECOVERY OF PREMIUMS BY INSURED ON WRONGFUL FORFEITURE OR REPUDIATION OF LIFE POLICY

1051-1052. (b) Recovery of premiums permitted—The Missouri rule

1052 (b). The sufficiency of the evidence to support an action to recover premiums paid on a life insurance policy, on the ground that the company had wrongfully declared the policy forfeited for failure to pay a premium in time is considered in *Suess v. Imperial Life Ins. Co.*, 91 S. W. 1041, 193 Mo. 564.

1054. (d) Same—North Carolina

1054 (d). Where an insurance company wrongfully canceled plaintiff's policy, plaintiff could recover the exact amount previously paid to defendant for premiums, as money which, in equity and good conscience, defendant ought to refund (*Scott v. Mutual Reserve Fund Life Ass'n*, 50 S. E. 221, 137 N. C. 515).

1054-1055. (e) Same—Texas

1054 (e). Where, after the passage by a mutual benefit society of a by-law scaling all \$5,000 certificates to \$2,000, the holder of a certificate for \$5,000 returned the same, with a request that a new certificate for \$2,000 be issued, she was not entitled to recover the premiums paid on the \$5,000 certificate (*Supreme Council A. L. H. v. Lyon* [Tex. Civ. App.] 88 S. W. 435). Re-rating, without authority, by a fraternal benefit society of a member is a repudiation of the contract, so as to give the member a right to recover assessments paid (*Ericson v. Supreme Ruling of Fraternal*

Mystic Circle, 105 Tex. 170, 146 S. W. 160, reversing [Tex. Civ. App.] 131 S. W. 92).

1055-1056. (f) Same—Federal cases

1056 (f). Where an assessment insurance association passed a by-law which amounted to a renunciation of its contracts and entitled a member to rescind his contract and recover the premiums paid thereon, but no action was brought therefor until three years and seven months after the passage of the by-law, an affidavit of defense which sets up that no claim for rescission had previously been made, and that during the delay a large number of members who might have been assessed for the payment of plaintiff's claim died or ceased to be members, and that new members were taken in without any notice of the claim, is sufficient on its face to show such laches as would prevent a summary judgment against the association (Supreme Council A. L. H. v. McAlarney, 135 Fed. 72, 67 C. C. A. 546, reversing [C. C.] 131 Fed. 538).

As to laches, see, also, Clymer v. Supreme Council, A. L. H. (C. C.) 138 Fed. 470.

1056-1057. (g) Same—Other jurisdictions

1057 (g). The sufficiency of the complaint in an action for recovery of premiums paid for insurance on the ground of unauthorized rescission of the contract by defendant is considered in Payne v. Supreme Ruling of Fraternal Mystic Circle, 71 S. E. 1113, 136 Ga. 705.

As to right to rescind for breach of contract and recover back payments made for assessments and dues, see Barlow v. Grand Lodge A. O. U. W. of Iowa (Iowa) 162 N. W. 757, L. R. A. 1917E, 1032.

IX. ASSIGNMENT OF THE POLICY

1. ASSIGNMENT OF POLICY—INSURANCE OF PROPERTY

1063-1065. (a) General principles

1064 (a). Where a fire policy is assigned by the insured with the consent of the insurer, a new contract is created, identical in terms with the one assigned, between the insurer and the assignee.

Niagara Fire Ins. Co. v. Layne, 162 Ky. 665, 172 S. W. 1090; *Swalne v. Teutonia Fire Ins. Co.*, 109 N. E. 825, 222 Mass. 108; *Wilms v. New Hampshire Fire Ins. Co.* (Mich.) 161 N. W. 940.

1064 (a). Where real estate is insured with a mortgage clause in the policy, an assignment of the policy to a subsequent purchaser of the property with the consent of the insurer does not require the approval of the mortgagee. And, moreover, in such case the original premium supports the insurance, both of the interest of the owner and that of the mortgagee, and the policy is sustained by that consideration in the hands of the assignee (*Funk v. Shawnee Fire Ins. Co.*, 108 Pac. 832, 82 Kan. 525, rehearing denied 83 Kan. 800, 108 Pac. 1135).

Under Rev. St. Tex. 1895, art. 308, permitting the obligee of any written instrument not negotiable by the law merchant to assign his interest therein, insurance policies are assignable in the same manner as other choses in action. *Prentice v. Security Ins. Co.* (Tex. Civ. App.) 153 S. W. 925.

An insurance policy is not an independent right of property that can be transferred apart from the notes it is given to secure, so that one person can hold the policy and another the notes. *Stone v. Sargent*, 220 Mass. 445, 107 N. E. 1014.

A release by a mortgagee of all interest under a fire policy previously held as security for his mortgage, and the direction by insured, assented to by insurer, for the payment of a loss to other mortgagees as their interest might appear, furnished a good consideration for payment to the mortgagees, and the policies were as effectual for the protection of the latter mortgagees as if they had been first issued payable to them (*Amory v. Reliance Ins. Co.*, 94 N. E. 677, 208 Mass. 378).

After loss has occurred covered by employer's liability policy, insured may properly assign policy in consideration of assignee's

payment of judgment covered thereby (Pacific Coast Casualty Co. v. General Bonding & Casualty Ins. Co., 240 Fed. 36, 153 C. C. A. 72).

1065-1066. (b) Insurance running with the property

1065 (b). A fire insurance policy is a personal contract for the indemnity of insured, and does not follow the property on its sale, in the absence of an agreement for the transfer of the policy.

Swaine v. Teutonia Fire Ins. Co., 109 N. E. 825, 222 Mass. 108; *Millard v. Beaumont*, 194 Mo. App. 69, 185 S. W. 547; *American Steam Laundry Co. v. Hamburg Bremen Fire Ins. Co.*, 121 Tenn. 13, 113 S. W. 394, 21 L. R. A. (N. S.) 442; *King v. Lancaster County Mut. Ins. Co.*, 45 Pa. Super. Ct. 464; *Springfield Fire & Marine Ins. Co. v. Boon* (Tex. Civ. App.) 194 S. W. 1006.

Since a sale of property insured does not carry with it the policy of insurance, in the absence of an assignment, the grantee cannot recover on the policy, because the insurer has no contract with him, and the grantor cannot recover because he has sustained no loss (*King v. Lancaster County Mut. Ins. Co.*, 45 Pa. Super. Ct. 464). So, too, the assignment of a mortgage does not transfer a policy of insurance held by the mortgagee, where the written transfer does not, in terms, undertake to assign it, and the assignee of the mortgage has no right of action as mortgagee to recover on the policy.

Kupfersmith v. Delaware Ins. Co. of Philadelphia, 80 N. J. Law, 191, 76 Atl. 329; *Weinberger v. Agricultural Ins. Co. of Watertown*, N. Y., 80 N. J. Law, 202, 76 Atl. 343.

1066-1068. (c) Necessity of consent by insurer

1066 (c). An assignment of a policy as such without the consent of the insurer is invalid as against the company.

Davis v. Bremer County Farmers' Mut. Fire Ins. Ass'n, 154 Iowa, 326, 134 N. W. 860; *Bartling v. German Mut. Lightning & Tornado Ins. Co. of Farmers of Maxfield and Vicinity*, 154 Iowa, 335, 134 N. W. 864; *Kamm & Schellinger Brewing Co. v. St. Joseph County Village Fire Ins. Co.*, 168 Mich. 606, 134 N. W. 999; *Leonard v. Farmers' Mut. Fire Ins. Co. of Monroe and Wayne Counties*, 192 Mich. 230, 158 N. W. 1041; *Stephenson v. Germania Fire Ins. Co.*, 100 Neb. 156, 160 N. W. 962, L. R. A. 1917D, 307.

The rule applies to policies in mutual companies (*Davis v. Bremer County Farmers' Mut. Fire Ins. Ass'n*, 154 Iowa, 326, 134 N. W. 860), and it also applies to policies of employers' liability insur-

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ance (*White v. Maryland Casualty Co.*, 139 App. Div. 179, 123 N. Y. Supp. 840).

But see *Bealmer v. Hartford Fire Ins. Co.* (Mo. App.) 193 S. W. 847, holding that where church trustees sold property insured against fire, and insurer had notice of purchasers' right in policy which also was sold, it should have notified trustees or purchasers of refusal to carry policy in favor of purchasers.

Hence, if the property is transferred and the property is destroyed before the necessary consent to the assignment of the policy is obtained, the assignee takes nothing under the policy.

Hall v. Continental Ins. Co. of New York, 84 S. W. 519, 27 Ky. Law Rep. 99; *Harper v. Michigan Mut. Tornado, Cyclone & Windstorm Ins. Co.*, 173 Mich. 459, 139 N. W. 27.

1067 (c). The provisions of the Iowa statute (Code, §§ 3044, 3046) declaring that instruments for the payment of money are assignable, and permitting assignment though the instruments themselves prohibit it, do not apply to assignments of insurance policies before the loss (*Davis v. Bremer County Farmers' Mut. Fire Ins. Ass'n*, 154 Iowa, 326, 134 N. W. 860).

The fact that a corporation insured in a fire policy transferred all its property, including the policy, to another corporation having the same stockholders, the original corporation continuing its existence, gave the latter corporation no rights under the policy, in the absence of the insurer's assent to such assignment according to the terms of the policy (*Miles Lamp Chimney Co. v. Erie Fire Ins. Co.*, 73 N. E. 107, 164 Ind. 181).

1068-1069. (d) Same—Collateral assignment

1068 (d). Where the insured had the right under his policy to transfer it as collateral security, the subsequent act of the insurance company in refusing to allow a clause to be attached making loss payable to another person did not affect such right (*Scottish-Union & National Ins. Co. of Edinburgh v. Andrews & Matthews*, 89 S. W. 419, 40 Tex. Civ. App. 184).

1069-1071. (e) Form and sufficiency of assignment

1069 (e). A mere delivery of the policy is not effective as an assignment, and though a parol assignment might be effective in equity, generally speaking the assignment must be in writing (*Fidelity & Deposit Co. of Maryland v. Johnston*, 117 La. 880, 42 South. 357). It has, however, been held in North Dakota that a fire policy may be pledged or assigned orally (*Hecker v. Commer-*

cial State Bank of Carrington, 35 N. D. 12, 159 N. W. 97). And it has been held in Missouri that the fact that no actual writing was made transferring or assigning fire policy to purchasers of property does not affect actual agreement transferring it (*Bealmer v. Hartford Fire Ins. Co.* [Mo. App.] 193 S. W. 847). As under the Georgia statute (Civ. Code 1910, § 2470) a contract of insurance must be in writing, an assignment thereof must be written (*Northwestern Nat. Ins. Co. v. Southern States Phosphate Fertilizer Co.* [Ga. App.] 93 S. E. 157). However, the parties are not bound to use a blank form of transfer printed on the back of the policy, in order to make an assignment thereof legal (*Gragg v. Home Ins. Co. of New York*, 90 S. W. 1045, 28 Ky. Law Rep. 988).

A mortgage loss payable clause is not an assignment of policy, but merely appoints mortgagee to collect insurance money in case of loss in the right of the insured (*Northwestern Nat. Ins. Co. v. Southern States Phosphate Fertilizer Co.* [Ga. App.] 93 S. E. 157). But in *Continental Ins. Co. v. Bair* (Ind. App.) 114 N. E. 763, it was said that the authorization of payment to a mortgagee is a conditional assignment or transfer of an interest in the policy.

An assignment of its indemnity policy by an insolvent coal company, the name of which had been stricken by the secretary of state from the public rolls for failure to pay its annual licenses, to the widow of a deceased employé, who had recovered judgment against the company for the death, was not void but voidable, and could not be complained of by the insurer (*Davies v. Maryland Casualty Co.*, 89 Wash. 571, 154 Pac. 1116, L. R. A. 1916D, 395, rehearing denied 89 Wash. 571, 155 Pac. 1035, L. R. A. 1916D, 398).

1071-1075. (f) Sufficiency of consent

1071 (f). Local agents, with power to effect contracts of insurance, have authority to consent to assignments (*Delaware Ins. Co. of Philadelphia v. Hill* [Tex. Civ. App.] 127 S. W. 283). So, where an insurance policy contemplated a possible sale of the property insured and provided for an assignment of the policy, the provisions that it should be void if the property were assigned or transferred without the consent of the company, and that only the secretary had authority to waive any of its terms and conditions, did not amount to a limitation on the authority of local agents with the power to make contracts of insurance, to make indorsements, and consent to assignments of the policy (*Sheets v. Iowa State Ins. Co.*, 153 Mo. App. 620, 135 S. W. 80).

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1075-1077. (g) Effect of assignment—Right to maintain action

1075 (g). When plaintiffs bought building and fire policy thereon from church trustees, they bought right to have policy transferred or assigned to them, provided insurer agreed, and, if insurer should not agree, they bought right to have paid them unearned premiums after surrender (*Bealmer v. Hartford Fire Ins. Co.* [Mo. App.] 193 S. W. 847).

Plaintiff, the purchaser of property from the parties originally insured, having the policy indorsed to himself as his interest should appear, and thereafter taking from the insured an assignment of his interest in a contract to purchase from plaintiff and an assignment of the policy, of which the insurer had notice, but to which its consent was not shown, had a cause of action on the policy (*Gourlay v. Insurance Co. of North America*, 181 Mich. 286, 148 N. W. 258).

If, when sale of insurance policy was effected on sale of house, the vendor by her agent stated that the unexpired term extended for 4½ years and accepted payment on that basis, purchaser might rely upon statements as forming an integral part of contract of purchase, where policy was in vendor's possession; and it is immaterial that statements were unintentionally and innocently made (*Napier v. Strong*, 19 Ga. App. 401, 91 S. E. 579).

1077. (h) Same—Equities and defenses

1077 (h). An assignee, who knows that the delivery of the policy was unauthorized, that it had never been accepted by the insured, and that on failure to pay premiums it was automatically canceled, is not entitled to recover (*Polk v. State Mut. Fire Ins. Co.* [Tex. Civ. App.] 151 S. W. 1126).

1077-1078. (i) Questions of practice

1078 (i). An averment in an action on a fire policy that the company had in writing consented to the assignment of the policy was sufficient as against a demurrer, and could only be required to be made more specific by motion (*Home Ins. Co. of New York v. Myers*, 107 S. W. 719, 32 Ky. Law Rep. 999).

2. ASSIGNMENT OF LIFE INSURANCE POLICIES—RIGHT TO ASSIGN

1079-1080. (a) What law governs

1079 (a). It is the general rule that an assignment of an insurance policy is governed by the law of the state where the assignment is made.

Western Life Indemnity Co. v. Rupp, 144 S. W. 743, 147 Ky. 489; *Wilde v. Wilde*, 209 Mass. 205, 95 N. E. 295; *Henry v. Thompson*, 78 N. J. Eq. 142, 78 Atl. 14; *Manhattan Life Ins. Co. v. Cohen* (Tex. Civ. App.) 139 S. W. 51; *Russell v. Grigsby*, 168 Fed. 577, 94 C. C. A. 61; *New York Life Ins. Co. v. Dunlevy*, 214 Fed. 1, 130 C. C. A. 473, affirming *Dunlevy v. New York Life Ins. Co.* (D. C.) 204 Fed. 870.

So it was held in *Manhattan Life Ins. Co. v. Cohen* (Tex. Civ. App.) 139 S. W. 51, that where life insurance policies belonging to a resident of Texas were assigned and delivered to the assignee's agent in Texas, the validity of the assignment was governed by the Texas laws, and not by the laws of Georgia, where the assignee resided. The rule was applied in *Russell v. Grigsby*, 168 Fed. 577, 94 C. C. A. 61, though the policy contained a clause to the effect that the place of contract was Pennsylvania.

1080 (a). It is, however, recognized that the rule may be modified, in view of the general construction and effect of the principal contract (*Wilde v. Wilde*, 209 Mass. 205, 95 N. E. 295). In *Northwestern Mutual Life Ins. Co. v. Adams*, 155 Wis. 335, 144 N. W. 1108, 52 L. R. A. (N. S.) 275, the policy was a Wisconsin contract by its terms. Under the law of Wisconsin, the beneficiary of a life insurance policy does not take a vested interest, but only a contingent interest in the policy. Some years after the issuance of the policy and just before his death the insured, while temporarily in Minnesota where he died, assigned the policy to his brother. By the law of Minnesota the beneficiary of a life policy takes a vested interest, and it was therefore contended that the insured had no right to assign the policy without the consent of the beneficiary. The Supreme Court of Wisconsin held, however, that as the policy was by its terms a Wisconsin contract, the insured had the property right in the policy fully vested, which was not divested by his residence in Minnesota and that he could therefore assign the policy—the beneficiary having only a contingent interest therein.

1080-1082. (b) Assignability in general

1080 (b). Aside from any question of insurable interest a life insurance policy is assignable as any other chose in action.

Fitzgerald v. Rawlings, 114 Md. 470, 79 Atl. 915, Ann. Cas. 1912A, 650; *Johnston v. Scott*, 137 N. Y. Supp. 243, 76 Misc. Rep. 641; *Foryciarz v. Prudential Ins. Co. of America*, 158 N. Y. Supp. 834, 95 Misc. Rep. 306; *Nixon v. Malone*, 100 Tex. 250, 98 S. W. 380, modifying judgment (Tex. Civ. App.) 95 S. W. 577.

An endowment policy, providing for payment at maturity to the insured, his executors or assigns, is assignable. *Eisenbach v. Mutual Life Ins. Co. of New York*, 147 N. Y. Supp. 962, 162 App. Div. 595, order affirmed 212 N. Y. 593, 106 N. E. 1033.

The assignment of a life insurance policy, on the day it is delivered to insured, to a person nominally acting as general agent of the insurer, does not vitiate the policy, in the absence of any fraud. *Peck v. Washington Life Ins. Co.*, 91 App. Div. 597, 87 N. Y. Supp. 210, affirmed in 74 N. E. 1122, 181 N. Y. 585.

But no person other than the persons designated in a policy can assign or surrender it (*Breard v. New York Life Ins. Co.*, 70 South. 799, 138 La. 774).

1081 (b). A life policy may be mortgaged, assigned, or pledged as collateral security.

New York Life Ins. Co. v. Kansas City Bank, 121 Mo. App. 479, 97 S. W. 195; *Russell v. Grigsby*, 168 Fed. 577, 94 C. C. A. 61.

So a loan and pledge contract whereby a life insurance company advanced money on a policy to insured, and the policy was assigned as collateral security, was in no sense a contract distinct and independent from the policy, but, on the contrary, such loan and pledge were contemplated by the policy, it providing that the company would make advances on the policy, and that thereupon the policy should be assigned to it as collateral security (*Burridge v. New York Life Ins. Co.*, 109 S. W. 560, 211 Mo. 158).

An insured, who for a valuable consideration sells and duly assigns the policy, is thereby estopped as against the company issuing the same to attack the validity of the assignment on the ground that the assignee had no insurable interest in his life (*Clark v. Equitable Life Assur. Soc.* [C. C.] 143 Fed. 175).

1082 (b). A clause in a policy, binding the insurer to pay the amount thereof after due "notice and proof of interest (if assigned or held as security) and of the death of" insured, indicates that it was the intention of the parties to make the same assignable (*New*

York Life Ins. Co. v. Kansas City Bank, 97 S. W. 195, 121 Mo. App. 479).

1082-1084. (c) Assignability of mutual benefit certificates

1082 (c). The right of a member of a beneficial association to designate a beneficiary is limited to the class to whom the association may lawfully contract to pay benefits, and hence an assignment, by a member, of a benefit payable on his death to a person not within the class enumerated in the law under which it is incorporated, is void, and cannot be enforced by the assignee.

Kerr v. Crane, 98 N. E. 783, 212 Mass. 224, 40 L. R. A. (N. S.) 692;
Ryan v. Firemen's Mut. Benev. Ass'n No. 1, 77 N. J. Law, 399, 72
Atl. 53; Coleman v. Anderson, 86 S. W. 730, 98 Tex. 570, af-
firming 82 S. W. 1057.

It is held in Illinois that, while a benefit certificate is not assignable at law, a beneficial interest therein may be transferred in equity, and courts of equity will protect such equitable beneficial interest.

Conner v. Conner, 145 Ill. App. 608; Order of Columbian Knights v. Matzel, 184 Ill. App. 15.

Nevertheless an assignment of a certificate to one not a lawful beneficiary under the statute will not be enforced in equity where the question of the unlawfulness of the beneficiary is set up by the society, and this notwithstanding the acceptance of dues and assessments from such unlawful beneficiary (Beth Moshav Z'Keinim of Chicago v. Grand Lodge Independent Western Star Order, 141 Ill. App. 305).

1083 (c). An assignment of a part of the proceeds of a mutual benefit certificate to persons not creditors of the insured was void (Jenkins v. Morrow, 109 S. W. 1051, 131 Mo. App. 288).

1084 (c). The assignment of an insurance contract to pay a burial benefit to a designated undertaker is a violation of Rev. St. 1908, § 289, as amended by Act April 9, 1908 (99 Ohio Laws, p. 131), forbidding the assignment of the contract of insurance which would result in the beneficiary being unable to purchase the burial supplies himself, and was therefore void (Robbins v. Hennessey, 99 N. E. 319, 86 Ohio St. 181).

1084-1086. (d) Assignment by husband and wife

1084 (d). An assignment of her industrial life insurance policy by a married woman to secure money to return to her native country in Europe is good as against the insured (Foryciarz v. Prudential Ins. Co., 158 N. Y. S. 834, 95 Misc. Rep. 306).

1086-1090. (e) Same—Statutes protecting policies from creditors

1087 (e). In *Canterbury v. Northwestern Mut. Life Ins. Co.*, 124 Wis. 169, 102 N. W. 1096, the facts were these: A husband procured a policy on his life, payable to his wife or her executors, administrators, or assigns. At the time the policies were issued the statutes in force were substantially the same as Rev. St. 1878, § 2347, providing that any person effecting insurance of the life of another may cause such insurance to be made payable to a married woman, and such a policy payable to a married woman shall inure to her separate use and benefit and that of her children, and the insurance shall be made payable to her free from the claims of her husband and his creditors. The section was amended by Laws 1889, p. 299, c. 271, § 1, by striking the word "of" from the phrase "insurance of the life of another," and inserting in lieu thereof the words, "on his own life or on"; and the section was again amended by Laws 1891, p. 482, c. 376, providing that every such policy payable to a married woman shall be her sole and separate property, and that the same shall be payable to her free from the control or disposition of her husband. It was held that an assignment of the policy in question by insured and the wife with the consent of the insurer was valid.

Under the New York act of 1840 (Laws 1840, c. 80), referring to life policies in favor of the wife upon the life of her husband, an assignment by a wife of her interest in such a policy is void. *Grems v. Traver*, 87 Misc. Rep. 644, 148 N. Y. Supp. 200, judgment affirmed 164 App. Div. 968, 149 N. Y. Supp. 1065.

1090-1093. (f) Assignment by insured

1090 (f). Where a life policy is payable to a designated beneficiary and no right to change the beneficiary is reserved, the policy cannot be assigned by the insured without the consent of the beneficiary.

Wilde v. Wilde, 95 N. E. 295, 209 Mass. 205; *Sullivan v. Maroney*, 76 N. J. Eq. 104, 73 Atl. 842; *Caplin v. Penn Mut. Life Ins. Co.*, 100 Misc. Rep. 374, 166 N. Y. Supp. 675; *Nashville Trust Co. v. First Nat. Bank*, 123 Tenn. 617, 134 S. W. 311; *McNeill v. Chinn*, 45 Tex. Civ. App. 551, 101 S. W. 465. But see *Meggett v. Northwestern Mut. Life Ins. Co.*, 138 Wis. 636, 120 N. W. 392, and *Slocum v. Northwestern Nat. Life Ins. Co.*, 135 Wis. 288, 115 N. W. 796, 14 L. R. A. (N. S.) 1110, 128 Am. St. Rep. 1028.

1091 (f). If the policy is payable primarily to a designated beneficiary and on a certain contingency to the estate of the insured,

the insured may by assignment convey his contingent interest (*Sullivan v. Maroney*, 77 N. J. Eq. 565, 78 Atl. 150, affirming 76 N. J. Eq. 104, 73 Atl. 842).

An insured, in a life policy payable to his wife and stipulating that he may, with the consent of the insurer, assign it, may, without the consent of the wife, assign the policy to the insurer as collateral for money borrowed from it; the wife having no vested right in the policy, either in the absence of statute or under Ky. St. 1903, § 654, providing that a policy payable to a married woman shall inure to her separate use independently of her husband or his creditors (*Crice v. Illinois Life Ins. Co.*, 92 S. W. 560, 122 Ky. 572, 29 Ky. Law Rep. 91, 121 Am. St. Rep. 489).

If, however, the right to change the beneficiary is reserved, the insured may assign the policy at will.

Alba v. Provident Sav. Life Assur. Soc. of New York, 43 South. 663, 118 La. 1021; *Cornell v. Mutual Life Ins. Co. of New York*, 179 Mo. App. 420, 165 S. W. 858; *Fuos v. Dietrich* (Tex. Civ. App.) 101 S. W. 291; *McNeill v. Chinn*, 45 Tex. Civ. App. 551, 101 S. W. 465.

Where there was nothing in the contract of insurance nor in any statute or provision in the charter of the company to indicate that the words "legal representatives" were used in their broader sense to mean heirs at law, and the policy was an endowment payable to the insured if he was alive at the end of 15 years, and to his legal representative if he died before that time, his heirs had no vested interest in the policy by the use of such phrase, which would prevent the insured from assigning the policy (*Page v. Metropolitan Life Ins. Co.*, 98 Ark. 340, 135 S. W. 911). A contingent interest, such as an assured's right to the cash surrender value of a life insurance policy after 20 years from its execution, could be assigned before such 20 years had expired (*Cornell v. Mutual Life Ins. Co. of New York*, 179 Mo. App. 420, 165 S. W. 858).

The charter of a life insurance company (in effect the same as Ky. St. 1903, §§ 654, 655), providing that a policy for the benefit of insured's wife or children shall not be made liable for his debts, but on his death the insurance shall be paid to the beneficiaries free of his debts, does not prohibit the insured in a paid-up policy, payable to his wife and children, and stipulating that he may, with the consent of the company, assign it or change the beneficiaries, from assigning it, without the consent of the beneficiaries, and he may borrow money from the company and assign it as collateral, without such consent (*Mutual Life Ins. Co. of Kentucky v. Twy-*

man, 92 S. W. 335, 28 Ky. Law Rep. 1153, 122 Ky. 513, 121 Am. St. Rep. 471, reversing on rehearing 89 S. W. 178).

1092 (f). A policy payable to the insured himself, or to his "assigns," "executors," "administrators," or "legal representatives," may be assigned by the insured without the consent of any other person except the company.

New York Life Ins. Co. v. Kansas City Bank, 97 S. W. 195, 121 Mo. App. 479; Nashville Trust Co. v. First Nat. Bank, 123 Tenn. 617, 134 S. W. 311; Nixon v. Malone (Tex. Civ. App.) 95 S. W. 577; New York Life Ins. Co. v. Same, Id. 585; Mutual Life Ins. Co. v. Same, Id.; Mutual Benefit Life Ins. Co. v. Same, Id.; judgment modified in 98 S. W. 380, 100 Tex. 250; Russell v. Grigsby, 168 Fed. 577, 94 C. C. A. 61.

1093-1095. (g) Assignment by beneficiary

1094 (g). The interest of the wife of insured, under the provision of the policy on his life that the insurance money shall be paid to her if she survives him, passes under her assignment of the policy. But under a life policy providing for payment of the insurance money to insured's wife or her assigns within 90 days after notice and proof of death of insured, and in case of the death of said assured before the death of insured then the money to be payable to their children, the right of the children, the wife having died before insured, was not defeated by her prior assignment of the policy, in which they did not join (Wilde v. Wilde, 209 Mass. 205, 95 N. E. 295).

An assignment of an insurance policy by the beneficiary prior to the insured's death and without his consent, is invalid (Lesem v. Mutual Life Ins. Co. of New York, 149 N. Y. Supp. 559, 164 App. Div. 507). Though the general rule is that, where the interest in a husband's life insurance policy is to be payable to his wife, if living, otherwise to her children, the wife receives merely an interest, contingent on her surviving the insured, which cannot be assigned by her even with her husband's consent, yet, where the wife warranted the validity and sufficiency of the assignment of her interest with the express consent of her husband indorsed on the assignment, it would pass the wife's interest, though she died before her husband without children, the warranty estopping either her or her husband's personal representatives from asserting against the assignee their title arising from there not being any children (Henry v. Thompson, 78 N. J. Eq. 142, 78 Atl. 14).

A policy issued to a wife on the life of her husband, to be paid

to her if living, otherwise to her children, gives to the wife only a contingent interest, which terminates on her death during the lifetime of the husband, hence her assignment of the policy, though with her husband's consent, gives the assignee no greater interest (*Hagerman v. Mutual Life Ins. Co.*, 45 Colo. 459, 103 Pac. 276).

Under the provisions of the New York Domestic Relations Law (Laws 1896, p. 220, c. 272, § 22), declaring that a policy of insurance on the life of any person for the benefit of a married woman is assignable, and may be surrendered to the company by her or her legal representatives with the written consent of the assured, where a husband holding a policy payable to his wife induced her to assign the same to him, but he executed no written consent to such assignment, it was void (*Dudley v. Fifth Avenue Trust Co.*, 100 N. Y. Supp. 934, 115 App. Div. 396).

A life policy providing that insurer on the death of insured will pay \$10,000 to his wife in equal semiannual installments of \$250 each, and will pay her \$10,000 six months after the payment of the last semiannual installment, does not create a trust within New York Personal Property Law (Consol. Laws, c. 41) § 15, prohibiting the transfer by assignment or otherwise of a beneficiary's right to enforce the performance of a trust to receive the income of personal property (*Black v. New York Life Ins. Co.* [Sup.] 126 N. Y. Supp. 334).

3. REQUISITES, CONSTRUCTION AND EFFECT OF ASSIGNMENTS OF LIFE POLICIES

1096-1099. (a) Requisites in general

1097 (a). Where a member of a benefit society assigned all his right and interest in and to his certificate to plaintiff, delivering the certificate to plaintiff, and performed all things within his power to have the transfer made, the transfer constituted an equitable assignment enforceable in equity, even though the member did not comply strictly with the rules of the society (*Farra v. Braman* [Ind. App.] 82 N. E. 926). So, too, where an applicant for insurance told his niece that if she would pay the premiums on a policy, she should receive the proceeds, and her husband, in response to a letter from the general manager of the insurer urging him to give notes for the premium signed, forwarded the notes, but asked that they be returned to him if the policy were not to be rewritten in favor of his wife, to which the general manager replied that assignments made

out by the applicant fully protected the applicant's niece, the fact that the applicant refused to sign a request to have the policy rewritten in favor of his niece, and that the policy which was so rewritten was not delivered, did not make the assignment of the policy invalid (*McFarlane v. Robertson*, 137 Ga. 132, 73 S. E. 490).

1099 (a). An assignment of a life policy under seal and acknowledged imports a valid consideration, though reciting that it is in consideration of love and affection (*Von Schuckmann v. Heinrich*, 93 App. Div. 278, 87 N. Y. Supp. 673, affirmed in 75 N. E. 1135, 182 N. Y. 538). So, too, love and affection was a sufficient consideration to support a policy holder's assignment of the policy to his mother and sister (*Northwestern Mut. Life Ins. Co. v. Wright*, 140 N. W. 1078, 153 Wis. 252, Ann. Cas. 1914D, 697). A pre-existing indebtedness constitutes a sufficient consideration for an assignment of the proceeds of an insurance policy (*Kaus v. Gracey*, 162 Iowa, 671, 144 N. W. 625). In *McFarlane v. Robertson*, 137 Ga. 132, 73 S. E. 490, it was said that where insured proposed to his niece that if she would pay the premiums on his policy she should have the proceeds, and her husband sent notes for the premiums to the general manager of the insurer, asking that they be returned if the policy were not to be rewritten in favor of his wife, the policy meanwhile having been assigned to his wife, who was liable on the notes, though the rewritten policy was not valid because of the refusal of the insured to sign a written request therefor, the assignment was not invalid because of the refusal to pay the notes. The settlement and satisfaction of the account between T. and B. and of the right of action of B. against T. for money due is sufficient consideration not only for the execution of the note of T. to B., but for the contemporaneous assignment to B. by a third person of a life policy as security for payment of the note (*Bridge v. Connecticut Mut. Life Ins. Co.*, 141 Pac. 375, 167 Cal. 774). To stop payment of a check given in consideration of the assignment of a policy rescinds the assignment, and precludes the assignee from thereafter asserting title to such policy (*Prudential Ins. Co. of America v. Dugger*, 163 Ill. App. 609).

A wife, named as beneficiary in policy reserving right to change beneficiary, by joining in assignment to secure debt, does not become a surety for the husband, and no consideration to her was necessary. *Mutual Ben. Life Ins. Co. v. Swett*, 222 Fed. 200, 137 C. C. A. 640, Ann. Cas. 1917B, 298).

One claiming a paid-up life policy under an assignment cannot hold the policy, on the theory that, at the time of the execution of the assignment, the assignor was indebted to him by virtue of a debt which did not enter into the assignment (*Bramblett v. Hargis' Ex'x*, 94 S. W. 20, 123 Ky. 141, 29 Ky. Law Rep. 610).

In *Banholzer v. Grand Lodge A. O. U. W.*, 119 Mo. App. 177, 95 S. W. 953, it was held that an agreement by a beneficiary in a benefit certificate, reciting that she was the beneficiary and was desirous of seeing certain children of her deceased husband, the insured, receive a portion of the insurance money, and that she agreed to divide the proceeds of the certificate when received, etc., among such children, was not an assignment, either legal or equitable, but merely an executory contract to assign. And in the same case it was said further that a contract between the beneficiary under a beneficial certificate and certain children of her deceased husband, for the division of the proceeds of the certificate, signed by one of such children, was not binding, in the absence of evidence of authority on the part of such child to execute the contract for the others.

1100-1102. (b) Necessity for written assignment—Formal requisites

1100 (b). A parol transfer of a life policy, accompanied by delivery, will operate as an assignment thereof, at least between the parties, without the formality of a written contract.

Doty v. Dickey, 96 S. W. 544, 29 Ky. Law Rep. 900; *Potvin v. Prudential Ins. Co. of America*, 114 N. E. 292, 225 Mass. 247; *Rahders, Merritt & Hagler v. People's Bank of Minneapolis*, 113 Minn. 496, 130 N. W. 16, Ann. Cas. 1912A, 299; *Cornell v. Mutual Life Ins. Co. of New York*, 179 Mo. App. 420, 165 S. W. 858; *McNevin v. Prudential Ins. Co.*, 57 Misc. Rep. 608, 108 N. Y. Supp. 745; *Tepper v. New York Life Ins. Co.*, 89 Misc. Rep. 224, 151 N. Y. Supp. 1049; *Coshocton Glass Co. v. Northwestern Mut. Life Ins. Co.*, 31 Ohio Cir. Ct. R. 675; *Connecticut Mut. Life Ins. Co. v. Tucker*, 61 Atl. 142, 27 R. I. 170, affirmed on rehearing 66 Atl. 209; *Nashville Trust Co. v. First Nat. Bank*, 123 Tenn. 617, 134 S. W. 311; *Nixon v. Malone* (Tex. Civ. App.) 95 S. W. 577; *New York Life Ins. Co. v. Same*, Id. 585, judgment modified in 98 S. W. 380, 100 Tex. 250. But see *Fidelity & Deposit Co. of Maryland v. Johnston*, 42 South. 357, 117 La. 880.

No particular form of words is essential to a valid assignment.

McNevin v. Prudential Ins. Co. of America, 108 N. Y. Supp. 745, 57 Misc. Rep. 608; *Ormond v. Connecticut Mut. Life Ins. Co.*, 58 S. E. 997, 145 N. C. 140; *Fuos v. Dietrich* (Tex. Civ. App.) 101 S. W. 291.

Any provisions in the policy with reference to the forms by which it may be assigned are for the benefit of the insurer only and may be waived by it (*McNeil v. Chinn*, 45 Tex. Civ. App. 551, 101 S. W. 465).

1101 (b). However, a clear intent to pass some right under the policy must be manifest. So in *Little v. Berry* (Ky.) 113 S. W. 902, it was held that an entry in a pocket memorandum book kept by a deceased of a note given by him, reciting that defendant, a surety, held a \$5,000 policy to secure him, the entry not being dated and the policy not being described, was not an assignment of the policy. And in *White v. Ratcliff*, 99 Miss. 93, 54 South. 658, it was held that where a life insurance policy was delivered, and shortly thereafter the insured procured from the agent a certificate, which was pinned to the policy, making his father the sole beneficiary, when it appeared that the insured never intended to assign the policy to his father, or to change the beneficiary therein, except in such manner as would leave him the full control of the policy, such instrument, being revocable at his pleasure, and testamentary in character, and not executed with the formalities of a will, is void.

An assignment of a life policy need not be attached to the policy itself (*Tower v. Stanley*, 220 Mass. 429, 107 N. E. 1010). So an assignment of a life insurance policy was valid between insured and the assignee, though not written upon or attached to the policy, and though no reference thereto was written or noted on the policy (*Herman v. Connecticut Mut. Life Ins. Co.*, 105 N. E. 450, 218 Mass. 181, Ann. Cas. 1916A, 822). A letter written to assignee of insurance policy as to application of proceeds in case of insured's death passes by way of assignment any remaining value possessed by the policy (*Mutual Ben. Life Ins. Co. v. Swett*, 222 Fed. 200, 137 C. C. A. 640, Ann. Cas. 1917B, 298).

Assignment on death benefit certificate blank form printed on back of certificate is valid, and evidence of assignee's title to the policy (*Chambers v. Great State Council*, I. O. R. M., 76 W. Va. 614, 86 S. E. 487).

In *Coshocton Glass Co. v. Northwestern Mut. Life Ins. Co.*, 31 Ohio Cir. Ct. R. 675, the facts were these: G. having decided to accept a policy issued upon his life with his wife named as beneficiary, it was thereafter agreed that, on account of the interest which a corporation of which G. was an officer had in the continuance of his life, the policy should be delivered to the corporation which should pay the premiums coming due thereunder, and should

become the payee thereof. It was held that the intention of the insurance company to deliver the policy to the corporation, and of the corporation to accept it, operated as an assignment of the policy to the corporation without the formality of a written contract of assignment.

In *Southern Mut. Life Ins. Ass'n v. Durdin*, 132 Ga. 495, 64 S. E. 264, 131 Am. St. Rep. 210, it appeared that the insured executed a writing stating that he had made application to insurer to change the beneficiary from his estate to a person named, and that if the change was not made during his life he desired the money to be paid to such person for her services as cook for him, and delivered the writing, with the policy, to her. On the same day he wrote the insurer, inclosed the amount charged for assenting to a change of beneficiary, informed it of the desired change, and that he owed such person for services, and wished her to have something as a gift after he was gone. It was held that this was sufficient to constitute an assignment of the policy to the person intended. A writing signed and acknowledged by the insured and the beneficiary, specifying that the insured thereby assigned the insurance policy to a certain person, is a contract of the beneficiary and in form an absolute assignment of his rights, though he was not named in the body of the instrument (*Carson v. National Life Ins. Co.*, 77 S. E. 353, 161 N. C. 441).

Voluntary statements by a party insured in a policy to a stranger after its issuance do not create or declare a trust in respect to its proceeds and are not binding on the beneficiary, who has a vested right to the fund, unless power to divest her of that right is specially reserved by the assured by some provision of the policy. *Michigan Mut. Life Ins. Co. v. Liphart*, 177 Ill. App. 645.

1102-1104. (c) Delivery

1102 (c). It has been held that there is no assignment in the absence of a delivery of the policy or the paper evidencing the transfer (*Huestis v. Prudential Life Ins. Co.*, 127 App. Div. 903, 111 N. Y. Supp. 461). But where life policies are assigned, neither payment of the consideration nor delivery of the policies is essential to pass title; delivery of the assignment to the assignee's agent being sufficient for that purpose (*Manhattan Life Ins. Co. v. Cohen* [Tex. Civ. App.] 139 S. W. 51). The policy holder's acts and declarations may be sufficient to show an intention to pass title to the policy to persons named in an assignment in duplicate, attached to the policy and sent to the company, although he retained possession of the

policy (*Northwestern Mut. Life Ins. Co. v. Wright*, 140 N. W. 1078, 153 Wis. 252, Ann. Cas. 1914D, 697). So, too, where one paid the consideration for the assignment of a life policy as collateral, relying on the insured's promise to assign same as collateral, and the insured executed the assignment, but did not deliver the policy in his lifetime the assignment was good as against every one except a purchaser in good faith for value (*Howe v. Hagan*, 97 N. Y. Supp. 86, 110 App. Div. 392). And generally a delivery of the assignment to the insurance company is sufficient, though the policy is retained by the insured.

New York Life Ins. Co. v. Dunlevy, 214 Fed. 1, 130 C. C. A. 473, affirming *Dunlevy v. New York Life Ins. Co.* (D. C.) 204 Fed. 670; *Northwestern Mut. Life Ins. Co. v. Wright*, 140 N. W. 1078, 153 Wis. 252, Ann. Cas. 1914D, 697.

A writing executed by insured, in nature of order on company to pay proceeds of his life policy to plaintiff, is not sufficient alone to vest title to the policy in plaintiff; but where policy is delivered, and it is intention of parties that title should be so vested, title passes (*Holleran v. Prudential Ins. Co. of America*, 159 N. Y. Supp. 284, 172 App. Div. 634).

Where life policy has been assigned in writing to wife of insured, her possession thereof raises presumption of delivery of assigned policy to her. *Devin v. Connecticut Mut. Life Ins. Co.* (Okl.) 158 Pac. 435. And see *Humphrey v. Mutual Life Ins. Co. of New York*, 151 Pac. 100, 86 Wash. 672.

1104-1106. (d) Consent of insurer

1105 (d). While a policy cannot, as against the company, be assigned without the insurer's consent (*White v. Maryland Casualty Co.*, 139 App. Div. 179, 123 N. Y. Supp. 840), yet, if an insurance company paid over the proceeds of a policy which had been assigned and claimed no benefit under a provision requiring its assent to the validity of an assignment, it thereby waived a failure to secure its assent to the assignment which could not be attacked for that reason by claimants of the fund (*Borchers v. Barckers*, 158 Mo. App. 267, 138 S. W. 555).

It has, however, been held in Indiana (*Stewart v. Gwynn*, 41 Ind. App. 320, 82 N. E. 1000, rehearing denied in 41 Ind. App. 320, 83 N. E. 753), that where an insurance policy, payable to the executors, administrators, and assigns of the insured, shows on its face that there has been no change of beneficiary or assignment of the policy under the requirements of the policy, and there is no show-

ing of any waiver of the company's rules as to such change or assignment, or any facts showing an excuse for not complying with the rules, an administrator of the estate of insured is entitled to the possession of the policy as against one claiming ownership thereof.

An assignment of a life insurance policy is valid between insured and the assignee, though no notice is given the insurer as required by the policy (*Herman v. Connecticut Mut. Life Ins. Co.*, 105 N. E. 450, 218 Mass. 181, Ann. Cas. 1916A, 822). So, too, it was held in *Thompson v. Equitable Life Assur. Society of the United States*, 95 S. C. 16, 78 S. E. 439, that where a life insurance policy was delivered to another by the insured with intent to vest the title in him, such delivery constitutes an assignment valid between the parties, though the consent of insurer was not obtained until after death of insured.

Assignee of life insurance policy payable in 20 years, who had insurer indorse liability thereon for its surrender value as a paid-up policy, was entitled to proceeds when payable. *Lee v. Equitable Life Assur. Soc.*, 195 Mo. App. 40, 189 S. W. 1195.

A letter written to the assignee of a policy, treated as additional assignment, is not ineffective as against beneficiary, because not filed with company as required by policy. *Mutual Ben. Life Ins. Co. v. Swett*, 222 Fed. 200, 137 C. C. A. 640, Ann. Cas. 1917B, 298.

1106-1108. (e) Fraud as between parties

1106 (e). One whose mind is so permanently impaired that he cannot act rationally can make no enforceable assignment of a life policy; it being immaterial that at the precise time he does not show any aberration. So an assignment of a life policy is not enforceable if through intoxication or insanity assignor is unable to understand the consequences of his act (*Searles v. Northwestern Mut. Life Ins. Co. of Milwaukee*, 148 Iowa, 65, 126 N. W. 801, 29 L. R. A. [N. S.] 405). Mental capacity to make an assignment of a life policy means intelligence sufficient to understand the act the insured is about to perform, the property he possesses, what disposition he is making of it, and the persons and object of his bounty. The assignment by a father of his interest in his life policy to his son, a few days before his death is akin to a testamentary act, and the rules regarding mental capacity and undue influence applicable to a testator should be applied (*Borchers v. Barckers*, 143 Mo. App. 72, 122 S. W. 357).

Where a widow after the death of her husband assigned a \$2,000 benefit certificate, to which she was entitled, to defendant R. in con-

sideration of \$200, and in an action for the conversion of the proceeds her contention that the assignment was with the understanding that the balance of the proceeds, less \$200, was to be paid to her, and should be appropriated to the payment of her husband's debts, was disputed, it was error to set aside the assignment on the theory that the widow had been overreached in the transaction as a matter of law (*Roberts v. Roberts* [Tex. Civ. App.] 99 S. W. 886). An assignment to a brother-in-law, at his instance, for \$2,500, of a life policy for \$5,000, a few days before death of insured, and when he was in extremis, is void, as an unconscionable contract, for constructive fraud in procuring it (*Prudential Life Ins. Co. of America v. La Chance*, 95 Atl. 223, 113 Me. 550).

1107 (e). Where a wife joined her husband in the assignment of an insurance policy upon his life in which she was the beneficiary, even if her signature to the assignment was the result of duress consisting in the conduct and threats of her husband, such duress would not affect the validity of the assignment in the absence of proof sufficient to connect the assignee with it or show knowledge of it (*Ely v. Hartford Life Ins. Co.*, 128 Ky. 799, 110 S. W. 265, 33 Ky. Law Rep. 272).

Where an administratrix was fraudulently induced to assign a life policy to the insurer's agent, and later instituted a suit to set aside the transfer and recover on the policy, and showed that the insurer had notice of the fraud, the facts did not show that plaintiff entered into a scheme to defraud the insurance company. *Empire Life Ins. Co. v. Mason*, 78 S. E. 935, 140 Ga. 141.

1109-1111. (g) Construction in general

1110 (g). An unconditional assignment of life policy divests insured of all title to policy and vests beneficial interest therein in assignee (*Devin v. Connecticut Mut. Life Ins. Co.* [Okl.] 158 P. 435). An assignment with insurer's consent constitutes a new contract between insurer and the assignee according to the terms of the policy (*Standard Life & Accident Ins. Co. v. Bambrick Bros. Const. Co.*, 143 S. W. 845, 163 Mo. App. 504). But a transfer of a casualty policy does not extend its terms to cover a class of employes of the transferee not included in the policy when executed (*Maryland Casualty Co. v. Little Rock Ry. & Electric Co.*, 122 S. W. 994, 92 Ark. 306). Where all persons designated in a policy do not concur in an assignment or surrender thereof, the interest of those not concurring is not affected (*Breard v. New York Life Ins. Co.*, 70 South. 799, 138 La. 774).

An assignment of an insurance policy as collateral security for "indebtedness" covers only a present indebtedness, at the time of the assignment, and not indebtedness to be thereafter created (In re De Haven's Estate, 84 Atl. 676, 236 Pa. 146). Where insurance policies were assigned to secure a particular indebtedness, the assignee was bound to apply the insurance money on that indebtedness, and could acquire no rights under his application thereof to a different indebtedness (Ward v. Ward, 154 Ky. 355, 157 S. W. 700). So the assignee of a policy as security for note is not entitled to hold it as security for a note taken for a subsequent loan, and to acquire no right to do so by writing in the note a notation that the policy was held as security (Herman v. Connecticut Mut. Life Ins. Co., 105 N. E. 450, 218 Mass. 181, Ann. Cas. 1916A, 822). But where a life policy was assigned as collateral security for a note which was several times renewed, additional assignments are not necessary to enable the creditor to recover upon the policy the original debt for which it was pledged, remaining unpaid (Mutual Benefit Life Ins. Co. v. First Nat. Bank, 169 S. W. 1028, 160 Ky. 538).

An assignment of a survivor's annuity policy by both husband and wife to bank construed as intended to secure husband's debt to bank. Edwards v. Jefferson Standard Life Ins. Co., 173 N. O. 614, 92 S. E. 695.

An assignee of a life policy taken as security for insured's note had the right, upon insured's refusal to pay premiums, to convert the policy into a paid-up policy upon notice to the insured. Bush v. Block, 195 Mo. App. 287, 187 S. W. 153.

The pledgee of a life insurance policy who had purchased it at a sale under the pledge can exercise the rights of owner thereof without first securing a judgment establishing its ownership against the insured (Feliciano Bank & Trust Co. v. Union Cent. Life Ins. Co., of Cincinnati, Ohio, 69 South. 91, 137 La. 674). After a life policy was assigned or pledged pursuant to a provision therein, authorizing its assignment, the assignee or pledgee could, without subsequent ratification or authorization, foreclose the pledge and enforce the assignment (Cornell v. Mutual Life Ins. Co. of New York, 179 Mo. App. 420, 165 S. W. 858). And where plaintiff pledged a policy insuring his life as security, and the lender, on the debtor's failure to pay premiums, converted the policy into a paid-up policy, the substituted policy must be regarded as held during the life of the pledge for the joint account of the plaintiff and defendant (Keeble v. Jones, 187 Ala. 207, 65 South. 384).

The assignee of a claim under an accident policy has no greater

rights or superior claims than his assignor (*Maryland Casualty Co. v. Grace*, 110 Miss. 488, 70 South. 577). But an assignment of a tontine policy and of dividend and all benefit and advantage to be had or derived therefrom transfers the tontine as well as the life benefits (*New York Life Ins. Co. v. Dunlevy*, 214 Fed. 1, 130 C. C. A. 473, affirming judgment *Dunlevy v. New York Life Ins. Co.* [D. C.] 204 Fed. 670). An assignment of a semitontine policy, authorizing the policy holder at the expiration of the tontine period to exercise certain options as to the surplus, was not invalid because he reserved to himself the right to exercise such options; it being competent for him to assign part and retain part (*Northwestern Mut. Life Ins. Co. v. Wright*, 140 N. W. 1078, 153 Wis. 252, Ann. Cas. 1914D, 697).

Where the insured assigned all his right, title, and interest in certain life insurance policies to "trustees to be named in my will," for plaintiff's use, this was held to mean the trustees named in the document finally admitted to probate as the will of insured (*Frost v. Frost*, 88 N. E. 446, 202 Mass. 100, 27 L. R. A. [N. S.] 184, 132 Am. St. Rep. 476).

Where a life policy was assigned by insured to a creditor in consideration of \$1 and the premiums due and to become due and other valuable considerations expressed in the assignment and a line of credit to be given insured by the assignee, the provision in the assignment that it was agreed that the transfer was not made to secure any indebtedness or as collateral security simply meant that the assignee should hold the entire proceeds of the policy for his own use, and did not render the assignment void (*Fitzgerald v. Rawlings*, 79 Atl. 915, 114 Md. 470, Ann. Cas. 1912A, 650).

The assignment of a life policy and an application for change of beneficiary being parts of the same transaction and in legal effect one instrument, a proviso in the assignment that, in case of death of insured, the assignee shall recover of the insurer only to the extent of his advances, is applicable to the entire transaction and reduces it to a contract of security. And a further proviso that, if the policy matures by death of insured, the assignee shall recover from the insurer only to the extent of his actual interest properly proven, if on its face ambiguous, will, on parol evidence to that effect, be treated as making the assignment one as security for advances (*Crowell v. Northwestern Nat. Life Ins. Co. of Minneapolis*, 140 Iowa, 258, 118 N. W. 412).

A written request by an insured to a life insurance company,

together with the slip attached by the company to the policy in accordance therewith, to amend the policy by making it payable to certain persons named, does not constitute an assignment, but is a change of beneficiary (*In re Dolan* [D. C.] 182 Fed. 949). In *McNeill v. Chinn*, 45 Tex. Civ. App. 551, 101 S. W. 465, the assured, having a policy payable to his daughter as beneficiary and containing a right to change such beneficiary and to assign the policy, executed an instrument transferring all right, title, and interest in the same to plaintiff in consideration of a loan. The transfer also declared that, on assured's death, plaintiff, his heirs and assigns, were authorized to collect the policy, apply the proceeds, or so much as necessary, to the payment of the debt, and to pay the balance, if any, to his wife. It was held that such transfer operated as an assignment of the policy to plaintiff as security for the debt, and also as a change of beneficiary from assured's daughter to his wife.

In *Meggett v. Northwestern Mut. Life Ins. Co.*, 138 Wis. 636, 120 N. W. 392, it appeared that a daughter applied for insurance on her father's life, and was named as beneficiary in the policy. Either she or her father paid the premiums, of which there were 10 in all, until an assignment by her of the policy, and the remaining premiums were presumptively paid by the assignee. At the time of the assignment the daughter and her father were in control of the policy jointly, and he consented thereto. It was held that the right of the assignee in the policy became absolute, and the interest of the daughter ceased, on the assignment, to the same extent as if the father alone had obtained the policy.

Where an assignee of a life policy delivered to the insured bonds and securities, which he absorbed by pledging them, the assignment was one for value, as against a subsequent assignee in consideration of her agreeing to become the wife of the insured (*Howe v. Hagan*, 97 N. Y. Supp. 86, 110 App. Div. 392). In *Coffman v. Liggett's Adm'r*, 107 Va. 418, 59 S. E. 392, an assignment of so much of the assignor's life policy as would be sufficient to pay his indebtedness to the assignee was not delivered, and the assignee had no knowledge thereof until after the death of the assignor, when it was found among his papers. The assignee did not know that the assignor was indebted to him because of misappropriation of funds intrusted for investment. It was held that a subsequent assignee of the policy for value and without notice, in the manner prescribed by the policy, took in equity a right superior to

the assignment. In *Ogletree v. Ogletree*, 127 Ga. 232, 55 S. E. 954, the policy named A. as beneficiary, and provided that there should be no change of beneficiary without A.'s consent, A., in writing, released all her interest to the insured, who assigned the policy to B., with the right to change the beneficiary, and the insured, with consent of the insurance company, then assigned the policy to C. It was held that B.'s interest in the policy by virtue of the assignment was subject to the right of the insured to substitute another beneficiary, and his interest was lost by the subsequent assignment to C.

An assignee of a life policy, who did not obtain possession of the policy, could maintain a bill in equity to have his rights established, where insured had made a subsequent assignment to another party. *Herman v. Connecticut Mut. Life Ins. Co.*, 105 N. E. 450, 218 Mass. 181, Ann. Cas. 1916A, 822.

A designated beneficiary under a fraternal benefit certificate who could not lawfully be designated cannot recover under an assignment to her of the rights of a lawful beneficiary under a former certificate which had been surrendered. *Bush v. Modern Woodmen of America* (Iowa) 152 N. W. 31.

1111-1113. (h) Right to redeem—Surrender and conversion

1111 (h). Though it has been held that in a suit in equity to redeem a policy assigned absolutely an allegation of tender before suit is not necessary (*Locke v. Bowman*, 168 Mo. App. 121, 151 S. W. 468), it was said in *Nashville Trust Co. v. First Nat. Bank*, 123 Tenn. 617, 134 S. W. 311, that where a husband, who has a policy on his life, payable to his executors, administrators, and assigns, absolutely transfers the policy to secure a particular debt and subsequently permitted the policy to remain in the hands of the assignee, and repeatedly agreed that it should stand as security for any amount for which he might become from time to time indebted to the assignee, the husband was estopped from securing possession of the policy without payment of any debt incurred on the credit of the policy as security. An assignee of a life policy, who permitted possession of the policy to remain in the hands of insured's agent, is entitled to redeem from a subsequent assignee as security for a debt upon payment of the indebtedness (*Herman v. Connecticut Mut. Life Ins. Co.*, 105 N. E. 450, 218 Mass. 181, Ann. Cas. 1916A, 822).

1113-1114. (i) Equities and defenses

1114 (i). One to whom an insured assigned the policy, possession of which he had secured by fraud from another, in payment for a pre-existing debt, is not a bona fide purchaser against whom the equity of the prior assignee would be cut off (*New Albany Nat. Bank v. Brown* [Ind. App.] 114 N. E. 486). There is no legal liability of insurer to corporation other than insured, to whom policy is transferred after expiration under agreement by which assets of assured were transferred to new corporation (*Philadelphia Pickling Co. v. Maryland Casualty Co.*, 89 N. J. Law, 330, 98 Atl. 433).

The assignee of a life policy acquires only the rights of the insured, and the assignment will not divest the right of the beneficiary to collect the proceeds of the policy upon the death of the insured; it appearing that the only right insured had was to collect the policy upon maturity, or to change the form of insurance (*Johnson v. New York Life Ins. Co.*, 56 Colo. 178, 138 Pac. 414, L. R. A. 1916A, 868).

Where insured signed a "certificate of advances," providing for an additional premium on his life policy, it was a valid charge against his assignee, claiming a paid-up policy provided therein. *Silverman v. Pittsburgh Life & Trust Co.*, 176 App. Div. 749, 163 N. Y. Supp. 1011.

1114-1116. (j) Rights growing out of assignment by assignee

1114 (j). A contract between the beneficiary named in life insurance certificates and a third person, by which the latter agreed to pay the assessments on condition that he be reimbursed therefor from the proceeds of the certificates, was assignable (*Coleman v. Anderson*, 86 S. W. 730, 98 Tex. 570, affirming [Tex. Civ. App.] 82 S. W. 1057).

An assignee of policy is authorized to assign his interest to an accommodation indorser on secured note, and indorser's executors acquired such title as enabled them to hold the policy as collateral and to sue thereon (*Mutual Ben. Life Ins. Co. v. Swett*, 222 Fed. 200, 137 C. C. A. 640, Ann. Cas. 1917B, 298).

1115 (j). The assignee of an assignee of a life policy acquires only the rights of his assignor (*Locke v. Bowman*, 168 Mo. App. 121, 151 S. W. 468). And a subsequent assignment of a life policy by one who had procured an assignment thereof by fraud is subject to the equities between the original assignor and his assignee (*Tripp v. Jordan*, 164 S. W. 158, 177 Mo. App. 339).

In *Coleman v. Anderson*, 98 Tex. 570, 86 S. W. 730, affirming (Tex. Civ. App.) 82 S. W. 1057, it was held that where defendant's assignor agreed to pay assessments on certain benefit certificates, on condition that he be reimbursed therefor from the proceeds of the certificates, the fact that, on a dispute arising between such assignor and the beneficiary, who objected to further payments, no further payments were made, was no defense to the assignor's right to reimbursement for the money actually expended. And, moreover, such agreement was not invalidated by rules of the society prohibiting assignments of certificates, and declaring that a member could not dispose of his certificate, or a part thereof, to a party who will agree to pay all his assessments; such rules being available to the society alone.

1116-1119. (k) Pleading and practice

1117 (k). A petition, alleging an assignment of a life policy to plaintiff in consideration of services for insured, is not demurrable because not setting out what such services were worth, or whether payment had been made (*Southern Mut. Life Ins. Ass'n v. Durdin*, 64 S. E. 264, 132 Ga. 495, 131 Am. St. Rep. 210). The fact that plaintiff alleged an assignment of the policy did not require an amendment of the pleadings to conform to the proofs, since a gift is a voluntary transfer from one to another without consideration, and the difference between a gift and any other assignment is merely in the method of proof (*McNevin v. Prudential Ins. Co. of America*, 108 N. Y. Supp. 745, 57 Misc. Rep. 608).

1118 (k). Possession at the same time by a bank of a note executed by an insured in a life policy and of the policy raises a presumption that the policy is held as collateral for the note (*New York Life Ins. Co. v. Kansas City Bank*, 97 S. W. 195, 121 Mo. App. 479). Though an insurance policy is a chose in action, and may be transferred by delivery without writing; yet where by its terms mere delivery will not give any right as against the beneficiary named therein, the presumptions from mere possession are rebutted (*Stewart v. Gwynn*, 41 Ind. App. 320, 82 N. E. 1000, rehearing denied 41 Ind. App. 320, 83 N. E. 753).

Where the complaint in an action to set aside an assignment showed that the assignment was prima facie void, the burden is on the defendant to show its validity (*Locke v. Bowman*, 168 Mo. App. 121, 151 S. W. 468). In the absence of a written assignment, the burden is on the holder of the policy to show the manner in which

he obtained the policy and that he is a bona fide holder (Cuyler v. Wallace, 183 N. Y. 291, 76 N. E. 1, 5 Ann. Cas. 407, reversing 101 App. Div. 207, 91 N. Y. Supp. 690).

The sufficiency of the evidence to show an assignment of the policy is considered in *New York Life Ins. Co. v. Kansas City Bank*, 97 S. W. 195, 121 Mo. App. 479; *McNevin v. Prudential Ins. Co. of America*, 108 N. Y. Supp. 745, 57 Misc. Rep. 608; *Ingersoll v. Pond*, 60 S. E. 738, 108 Va. 179. To show reassignment see *Cuyler v. Wallace*, 183 N. Y. 291, 76 N. E. 1, 5 Ann. Cas. 407, reversing 101 App. Div. 207, 91 N. Y. Supp. 690.

The sufficiency of the evidence to show that an assignment of a life insurance policy to a third person having no insurable interest was obtained by fraud is considered in *Mutual Life Ins. Co. of New York v. Lane* (C. C.) 151 Fed. 276, affirmed in *Alexander v. Lane*, 157 Fed. 1002, 85 C. C. A. 677.

The sufficiency of the evidence to show mental capacity to assign is considered in *Andrews v. Lavery*, 159 Mich. 26, 123 N. W. 543; *Borchers v. Barckers*, 143 Mo. App. 72, 122 S. W. 357; *Woods v. Woods' Adm'r*, 130 Ky. 162, 113 S. W. 79, 19 L. R. A. (N. S.) 233. To show undue influence in obtaining the assignment, *Borchers v. Barckers*, 143 Mo. App. 72, 122 S. W. 357; *Andrews v. Lavery*, 159 Mich. 26, 123 N. W. 543.

The presumption of legal delivery of an assignment to insured's wife of the policy on his life, is not negatived by it being found among his papers after his death, subsequent to hers. *Shorey v. Webb*, 89 Atl. 391, 122 Md. 209.

**X. AVOIDANCE OF CONTRACT FOR CONCEALMENT,
MISREPRESENTATION, OR BREACH OF WAR-
RANTY OR CONDITION PRECEDENT—
INSURANCE OF PROPERTY**

**1. DISTINCTION BETWEEN WARRANTIES, REPRESENTATIONS,
AND CONDITIONS PRECEDENT**

**1127-1130. (b) Warranties and representations defined and distin-
guished in general**

1127 (b). A warranty in a contract of insurance is a stipulation of the contract itself, often distinct from and collateral to its main purpose, sometimes expressed in point of time before the main obligations are phrased, and yet, whether made previously or contemporaneously, none the less a term of the contract, and supported by or becoming a part of its consideration (*Everson v. General Fire & Life Assur. Corp., Limited*, of Perth, Scotland, 88 N. E. 658, 202 Mass. 169). Generally speaking, in the absence of statute, statements regarding the risk are regarded as warranties (*Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co.*, 56 Wash. 681, 106 Pac. 194, 28 L. R. A. [N. S.] 593).

**1130-1133. (c) General characteristics of warranties and represen-
tations**

1131 (c). Warranties may be affirmative or promissory. If the statement relates to an existing fact or condition, it is affirmative. If the stipulation is as to the performance or omission of certain acts after the issuance of the policy, it is promissory (*Miller v. Commercial Union Assur. Co.*, 69 Wash. 529, 125 Pac. 782).

1132 (c). It is not necessary to use the word "warranty" in order to give a statement or stipulation the character of a warranty (*Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co.*, 56 Wash. 681, 106 Pac. 194, 28 L. R. A. [N. S.] 593).

1133-1136. (d) Statements contained in or made part of the policy

1133 (d). Where, by the express terms of the application and policy, the application is made a part of the contract, and the statements therein are warranted true, such statements are warranties.

National Mut. Fire Ins. Co. v. Duncan, 44 Colo. 472, 98 Pac. 634, 20 L. R. A. (N. S.) 340; *Donley v. Glens Falls Ins. Co.*, 184 N. Y. 107, 76

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N. E. 914, 6 Ann. Cas. 81, reversing 100 App. Div. 69, 91 N. Y. Supp. 302; *Deming Inv. Co. v. Shawnee Fire Ins. Co.*, 83 Pac. 918, 16 Okl. 1, 4 L. R. A. (N. S.) 607; *Linzee v. Frankfort General Ins. Co. of Frankfort-on-the-Main, Germany*, 147 N. Y. Supp. 606, 162 App. Div. 282.

1136-1140. (e) Sufficiency of reference to make statements part of the policy

1137 (e). Where an application for insurance provided that the statements contained are made "a special warranty," the same as if written on the face of the policy, such warranties have the same effect as those in the body of the policy (*Donley v. Glens Falls Ins. Co.*, 76 N. E. 914, 184 N. Y. 107, 6 Ann. Cas. 81, reversing 100 App. Div. 69, 91 N. Y. Supp. 302).

1142-1144. (g) Application of general rules of construction

1142 (g). Where there is any doubt as to whether a stipulation in an insurance policy is an express warranty, the court should incline to avoid the construction which imposes upon the assured the obligation of a warranty.

Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co., 59 Wash. 501, 110 Pac. 38, reversing 106 Pac. 194, 56 Wash. 681, 28 L. R. A. (N. S.) 593, on rehearing; *Wilson v. Commercial Union Assur. Co.*, 90 Vt. 105, 96 Atl. 540; *National Live Stock Ins. Co. v. Owens* (Ind. App.) 113 N. E. 1024.

1147-1148. (k) Qualified recitals—Character dependent on materiality

1147 (k). Where parties expressly stipulate that a representation shall be regarded as material, it becomes a warranty (*Miller v. Commercial Union Assur. Co.*, 125 Pac. 782, 69 Wash. 529). And generally all statements regarding the risk are warranties, though the word "warranty" is not used (*Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co.*, 106 Pac. 194, 56 Wash. 681, 28 L. R. A. [N. S.] 593).

1150-1151. (n) Failure to make representation as to facts required by conditions of policy

1150 (n). Laws 1892, p. 1991, c. 690, § 139, as amended by Laws 1894, p. 1378, c. 611, § 1, provides for the appointment of agents to procure policies of fire insurance incorporations not authorized to do business in the state and requires a filing of affidavits with the insurance department showing that insured was unable to procure the full amount of insurance required from corporations authorized to

transact business in the state. It has been held that where an applicant for insurance in such a company on request for the names of three admitted companies on the list gave the names of certain companies which were not on the list, such an erroneous statement made by the applicant did not amount to a warranty; the policy being on the standard form, which contains no such warranty (*Hirsch v. Fidelitas Societe Anonyme D'Assurances & De Reassurances*, 99 N. Y. Supp. 517, 50 Misc. Rep. 582). So, where the application for a fire insurance policy provided that the property had been profitable, and that insured had every reason to believe that it would so continue, but further showed that the building and machinery was put up in August, 1912, and was insured October 29, 1912, so that there was no chance to know that it was profitable, the insurer knew all that insured could know, and there was no warranty of profitability (*Padgett v. North Carolina Home Ins. Co.*, 82 S. E. 409, 98 S. C. 244).

1151-1153. (o) Conditions precedent

1151 (o). A "condition precedent" in an insurance contract is a condition without performance of which the contract, though in form executed by the parties and delivered, does not spring into life; whereas a "warranty" does not suspend or defeat the operation of the contract, but a breach affords either the remedy provided in the contract or those furnished by the law (*Everson v. General Fire & Life Assur. Corp., Limited*, of Perth, Scotland, 88 N. E. 658, 202 Mass. 169).

2. EFFECT OF MISREPRESENTATION OR BREACH OF WARRANTY OR CONDITION PRECEDENT AS DEPENDENT ON MATERIALITY AND ON KNOWLEDGE AND INTENT OF APPLICANT

1154-1155. (a) Effect of breach of warranty

1154 (a). Where, in an application for fire insurance made to inform the insurance company of the facts as to the property to be insured, the applicant warrants his answers to be true, a stipulation in the application and policy that if any of the statements are false the policy shall be void is reasonable (*Deming Inv. Co. v. Shawnee Fire Ins. Co.*, 83 Pac. 918, 16 Okl. 1, 4 L. R. A. [N. S.] 607). In the case of a warranty the only concern of the courts is, in the absence of a contrary statutory enactment, to ascertain whether it has been complied with (*St. Landry Wholesale Mercantile Co. v.*

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New-Hampshire Fire Ins. Co., 38 South. 87, 114 La. 146, 3 Ann. Cas. 821). The statement must be literally true (National Mut. Fire Ins. Co. v. Duncan, 44 Colo. 472, 98 Pac. 634, 20 L. R. A. [N. S.] 340); or, as is sometimes said, the warranty must be strictly satisfied (National Live Stock Ins. Co. v. Owens [Ind. App.] 113 N. E. 1024).

1155-1157. (b) Same—Materiality of facts warranted

1156 (b). If a statement warranted to be true is shown to be false, the effect of the breach is not dependent on whether the statement relates to a material or immaterial fact.

National Mut. Fire Ins. Co. v. Duncan, 44 Colo. 472, 98 Pac. 634, 20 L. R. A. (N. S.) 340; Deming Inv. Co. v. Shawnee Fire Ins. Co., 16 Okl. 1, 83 Pac. 918, 4 L. R. A. (N. S.) 607; National Live Stock Ins. Co. v. Owens (Ind. App.) 113 N. E. 1024.

1158-1160. (d) Misrepresentation and effect thereof

1158 (d). In view of the provisions of the Iowa statute (Code, § 1741) requiring a copy of the application to be attached to the policy, it has been held in *Salzman v. Machinery Mut. Ins. Ass'n*, 142 Iowa, 99, 120 N. W. 697, that a misrepresentation by an applicant for fire insurance is no defense to liability on the policy, where a copy of the application is not attached to the policy.

1161-1165. (e) Same—Materiality of facts represented

1161 (e). Whether an alleged misrepresentation will avoid the policy depends on its materiality to the risk undertaken.

British & Foreign Marine Ins. Co., Limited, of Liverpool v. Cummings, 113 Md. 350, 76 Atl. 571; *Miller v. Commercial Union Assur. Co.*, 125 Pac. 782, 69 Wash. 529; *National Live Stock Ins. Co. v. Owens* (Ind. App.) 113 N. E. 1024; *St. Paul Fire & Marine Ins. Co. v. Huff* (Tex. Civ. App.) 172 S. W. 755.

1165-1167. (f) Misrepresentation as affected by intent of applicant

1165 (f). The mere fact that representations made by the insured are false will not avoid the policy, if the statements were made in good faith and without intent to deceive or defraud.

North British Mercantile Ins. Co. v. Union Stockyards Co., 120 Ky. 465, 87 S. W. 285; *Brunswick-Balke-Collender Co. v. Northern Assur. Co.*, 142 Mich. 29, 105 N. W. 76; *Walker v. Western Underwriters' Ass'n*, 105 N. W. 597, 142 Mich. 162; *Waller v. City of New York Ins. Co.*, 84 Or. 284, 164 Pac. 959; *American Nat. Ins. Co. v. Anderson* (Tex. Civ. App.) 179 S. W. 66; *Kentucky Live Stock Ins. Co. v. McWilliams*, 190 S. W. 697, 173 Ky. 92 (under statute).

In *Cox v. C. G. Blake Co.*, 100 Misc. Rep. 135, 166 N. Y. Supp. 294, however, it was held that whether suppression of facts as to marine risk arises from fraud, or merely from mistake, negligence, or accident, policy may be avoided on ground that insurer has been deceived, and not that insured has intended to deceive.

3. PLEADING AND PRACTICE WITH REFERENCE TO MISREPRESENTATION OR BREACH OF WARRANTY OR CONDITION IN GENERAL

1174-1176. (a) Pleading truth of representations and warranties and performance of condition

1174 (a). The rule undoubtedly is that the insured must plead and prove compliance with conditions precedent.

Coen v. Denver Tp. Mut. Fire Ins. Co., 155 Ill. App. 332; *Williams v. Fire Ass'n of Philadelphia*, 104 N. Y. Supp. 100, 119 App. Div. 573; *St. Paul Fire & Marine Ins. Co. v. Mittendorf*, 24 Okl. 651, 104 Pac. 354, 28 L. R. A. (N. S.) 651.

A general averment of performance of such conditions is sufficient.

Ohio Farmers' Ins. Co. v. Vogel (Ind. App.) 73 N. E. 612; *McGlade v. Home Ins. Co.*, 71 N. J. Law, 40, 59 Atl. 628; *Port Blakeley Mill Co. v. Hartford Fire Ins. Co.*, 50 Wash. 657, 97 Pac. 781; *Cohen v. Home Ins. Co.* (Del.) 95 Atl. 912.

1175 (a). Where, in an action on a fire policy, plaintiffs pleaded generally, as under Ballinger's Ann. Codes & St. § 4934 (Pierce's Code, § 404) they have a right to plead, as to conditions precedent; that they have performed and complied with all the terms, provisions, and conditions of the policy on their part to be performed or complied with—such allegation has reference only to the performance of conditions precedent, and not to conditions subsequent, as to which the insurer has the burden of proof (*Port Blakeley Mill Co. v. Hartford Fire Ins. Co.*, 97 Pac. 781, 50 Wash. 657). An allegation, in an action on a fire policy, that plaintiff had "complied with each and every one of the terms, conditions, and agreements of the said policy on his part to be kept and performed," is not equivalent to an allegation that he "duly" performed all conditions, etc., as permitted by Code Civ. Proc. § 533, permitting one in pleading the performance of the conditions precedent to a contract, to state generally that he duly performed all the conditions on his part, without alleging the facts constituting performance (*Feu-*

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erstein v. German Union Fire Ins. Co. of Baltimore, 126 N. Y. Supp. 201, 141 App. Div. 456).

1176-1177. (b) Pleading misrepresentation or breach of warranty or condition

1176 (b). In an action on an insurance policy, misrepresentation or breach of warranty or condition is a matter of defense, to be pleaded and proved by the insurer.

Scottish National Ins. Co. v. Adams, 122 Ill. App. 471; Salzman v. Machinery Mut. Ins. Ass'n, 142 Iowa, 99, 120 N. W. 697; Independent Transp. Co. v. Canton Ins. Office (D. C.) 173 Fed. 564.

Such defenses must be pleaded specially.

Loyal Mut. Fire Ins. Co. v. J. S. Brown & Bro. Mercantile Co., 47 Colo. 467, 107 Pac. 1098; Coen v. Denver Tp. Mut. Fire Ins. Co., 155 Ill. App. 332; McGlade v. Home Ins. Co., 59 Atl. 628, 71 N. J. Law, 40; Smith v. Mutual Cash Guaranty Fire Ins. Co., 21 S. D. 433, 113 N. W. 94; Tucker v. Colonial Fire Ins. Co., 58 W. Va. 30, 51 S. E. 86.

An insurer is not obliged to return or offer to return premiums which had been voluntarily paid on a policy which never attaches, before notice of the fact that the policy is not in force, as a condition precedent to availing itself of its defense to an action on the policy (In re Millers' & Manufacturers' Ins. Co., 106 N. W. 485, 97 Minn. 98, 4 L. R. A. [N. S.] 231, 7 Ann. Cas. 1144).

1177-1178. (c) Same—Form and sufficiency of plea

1177 (c). In actions on insurance policies, where the breach of conditions of the policy is relied on as a defense, such conditions should be set out in the plea, at least in substance, so that the court may determine on demurrer whether the facts stated as constituting the breach amounted in law to a breach of the conditions (Norwich Union Fire Ins. Soc. v. Prude, 156 Ala. 565, 46 South. 974). A plea that plaintiff did not keep the covenants and warranties, nor comply with the terms of the policies, without stating which warranties, conditions, and terms of the policies plaintiff had not performed, was insufficient, for incompleteness and indefiniteness (Cosmopolitan Fire Ins. Co. v. Putnal, 60 Fla. 41, 53 South. 444).

Where, in an action on an insurance policy, there is a general averment of performance of conditions precedent, imposing on the defendant the duty of pleading specifically, under Practice Act, § 118 (P. L. 1903, p. 570), such duty is not complied with, in response to a demand for a specification of defenses under Practice Act, §

104 (P. L. 1903, p. 567), by specifying failure of plaintiff to give the proofs of loss required by the policy, as such response is no part of the pleading (*McGlade v. Home Ins. Co.*, 59 Atl. 628, 71 N. J. Law, 40).

An insurer, when sued on a fire policy, cannot rely on fraud or misrepresentation in the application, where it does not, as required by circuit court rule No. 7, indicate in the notice attached to its plea its intention so to do. *Maas v. Anchor Fire Ins. Co.*, 111 N. W. 1044, 148 Mich. 432; *Baumler v. Farmers' Northern Mut. Fire Ins. Co.*, 111 N. W. 1069, 148 Mich. 430.

In an action on a policy of fire insurance, plaintiff is not required to prove compliance with any condition or warranty therein which defendant does not, under Code 1899, c. 125, § 64, by a statement filed, specify plaintiff's failure to perform. *Tucker v. Colonial Fire Ins. Co.*, 51 S. E. 86, 58 W. Va. 30.

1181-1182. (g) Evidence—Presumptions and burden of proof

1181 (g). The insured makes out a prima facie case and sustains the burden resting upon him in respect to conditions not specifically put in issue by proof of his interest, the issuance of the policy, the loss, and his compliance with the proofs of loss (*Benanti v. Delaware Ins. Co.*, 84 Atl. 109, 86 Conn. 15, Ann. Cas. 1913D, 826).

The burden of showing breach of condition or the falsity of a statement and its materiality is on the defendant.

British & Foreign Marine Ins. Co., Limited, of Liverpool, v. Cummings, 113 Md. 350, 76 Atl. 571; *Capital Fire Ins. Co. v. Carroll*, 26 Okl. 286, 109 Pac. 535; *Northern Assur. Co. of London v. Applegate* (Tex. Civ. App.) 145 S. W. 295. But see *Benanti v. Delaware Ins. Co.*, 86 Conn. 15, 84 Atl. 109, Ann. Cas. 1913D, 826, holding that, if conditions precedent are specifically put in issue, the plaintiff must sustain the burden of proof as to them. *Alabama Fidelity & Casualty Co. v. Alabama Penny Sav. Bank* (Ala.) 76 South. 103; *Stanyan v. Security Mut. Life Ins. Co.* (Vt.) 99 Atl. 417, L. R. A. 1917C, 350; *Murphy v. National Travelers' Benefit Ass'n* (Iowa) 161 N. W. 57, L. R. A. 1917C, 338; *Houseman v. Home Ins. Co.*, 78 W. Va. 203, 88 S. E. 1048, L. R. A. 1917A, 299; *Greenberg v. Firemen's Ins. Co.* (Sup.) 159 N. Y. Supp. 837; *Crites v. Capital Fire Ins. Co. of Lincoln*, 137 N. W. 847, 91 Neb. 771.

1182-1183. (h) Same—Admissibility

1183 (h). An insurer is precluded from asserting invalidity of a policy on the ground that insured did not have absolute ownership as required by the policy, where the interest of insured was

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shown by the application, and no copy of the application was attached to the policy as required by St. 1898, § 1945a, as amended by Laws 1905, c. 51, § 1 (*Coats v. Camden Fire Ins. Ass'n*, 135 N. W. 524, 149 Wis. 129). So, too, it was held in *Mecca Fire Ins. Co. of Waco v. Moore* (Tex. Civ. App.) 128 S. W. 441, that, where there was no written application for a fire policy, a question whether insured answered truthfully all questions asked him by the insurer's local agent at the time the policy was written was irrelevant.

It being unnecessary in suit on policy to make the application a part of the complaint or to allege or prove that answers therein were true, the defense of false answers constituting warranty is not admissible under a general denial under *Burns' Ann. St.* 1914, § 361 (*National Live Stock Ins. Co. v. Owens* [Ind. App.] 113 N. E. 1024).

1183-1184. (i) Same—Weight and sufficiency

1183 (i). The sufficiency of the evidence to show misrepresentation is considered in *Kinney v. Rochester German Ins. Co.*, 141 Ill. App. 543; *Kinney v. Caledonian Ins. Co.*, 148 Ill. App. 256; *Same v. Buffalo German Ins. Co.*, 148 Ill. App. 260; *Kentucky Live Stock Ins. Co. v. McWilliams*, 190 S. W. 697, 173 Ky. 92; *Waller v. City of New York Ins. Co.*, 84 Or. 284, 164 Pac. 959.

1185-1186. (k) Questions for jury

1185 (k). The materiality of any warranty of fact in applications for fire insurance is a question for the court as a matter of law, where the character of the warranty or the evidence as to its materiality is such that a decision but one way can be sustained by the court; but it is for the jury when the evidence is such that a decision either way may be sustained.

Connecticut Fire Ins. Co. v. Manning, 160 Fed. 382, 87 C. C. A. 334, 15 Ann. Cas. 338; *Orient Ins. Co. v. Van Zandt-Bruce Drug Co.* (Okla.) 151 Pac. 323; *Farber v. American Automobile Ins. Co.*, 177 S. W. 675, 191 Mo. App. 307.

Where nothing was shown to sustain the defense based on alleged false and fraudulent warranties in the application, the issue was properly withdrawn from the jury (*Krell v. Chickasaw Farmers' Mut. Fire Ins. Co.*, 104 N. W. 364, 127 Iowa, 748).

**4. STATUTORY PROVISIONS RELATING TO AVOIDANCE OF
POLICY FOR MISREPRESENTATION OR BREACH
OF WARRANTY**

1189-1192. (a) Statutory provisions qualifying strict rules

1190 (a). The Texas statute (Rev. St. 1895, art. 3096aa, as added by Gen. Laws 1903, p. 94), providing that any provision in any contract or policy of insurance that the answers or statements made in the application or in the contract, if false, shall render the contract or policy void or voidable, shall be of no effect and shall not be a defense to a suit on the contract, unless it be shown on the trial thereof that the matter represented was material to the risk, relates to fire as well as life policies.

Hartford Fire Ins. Co. v. Wright, 58 Tex. Civ. App. 237, 125 S. W. 363;
Scottish Union & National Ins. Co. v. Wade, 59 Tex. Civ. App. 631,
127 S. W. 1186.

The statute applies only when there are misrepresentations by the insured, either in the application or in the policy, and not to conditions (Hartford Fire Ins. Co. v. Wright, 58 Tex. Civ. App. 237, 125 S. W. 363). But it does apply to covenants of warranty and stipulations in the nature of warranties (Mecca Fire Ins. Co. of Waco v. Stricker [Tex. Civ. App.] 136 S. W. 599). These provisions of the statute were held constitutional in McPherson v. Camden Fire Ins. Co. (Tex. Civ. App.) 185 S. W. 1055.

Civ. Code Cal. §§ 2608, 2610, and 2611, providing for the avoidance of an insurance policy for the breach of a material warranty, apply to express as well as implied warranties, and change the common-law rule that a breach of an express warranty voids the policy, whether material or not (Victoria S. S. Co. v. Western Assur. Co. of Toronto, 167 Cal. 348, 139 Pac. 807).

It is the purpose of Ky. St. § 639, providing that misrepresentations in insurance application, unless material or fraudulent, shall not prevent recovery, to prevent loss of indemnity on misrepresentations not fraudulent or material (Kentucky Live Stock Ins. Co. v. McWilliams, 190 S. W. 697, 173 Ky. 92).

A warranty by insured, inserted in the body of a fire policy, is not dependent on the negotiations embodied in the application, and St. Mass. 1907, c. 576, § 21, relating to oral warranties, is inapplicable (Elder v. Federal Ins. Co., 100 N. E. 655, 213 Mass. 389).

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Rev. St. Mo. 1909, § 7025, declaring that a warranty of a fact not material shall be taken as a representation only, does not impair the effect of a warranty as to a fact material to the risk insured against (*Farber v. American Automobile Ins. Co.*, 177 S. W. 675, 191 Mo. App. 307).

Rev. St. Neb. 1913, § 3187, relating to breach of warranty or condition, does not apply to case where insurance company has never entered into contractual relations with person claiming under policy (*Stephenson v. Germania Fire Ins. Co.*, 100 Neb. 456, 160 N. W. 962, L. R. A. 1917D, 307).

1192-1193. (b) Operation of statutes as dependent on materiality and intent

1192 (b). Ky. St. 1903, § 639, providing that all statements or descriptions in any application for insurance shall be held representations, and not warranties, and no misrepresentations, unless material, shall prevent a recovery on the policy, applies to the policy of insurance, as well as to the application which precedes it; and a policy is not void if matter relevant to the transaction, but not material to the risk, has not been disclosed (*Hartford Fire Ins. Co. v. McClain*, 85 S. W. 699, 27 Ky. Law Rep. 461). The Missouri statute (Rev. St. Mo. 1899, §§ 7973-7975; Ann. St. 1906, pp. 3791, 3792) provides that warranties of facts or conditions in applications for fire insurance policies shall, if not material to the risks, be deemed representations only. It has been held that warranties of facts or conditions which are material to the risks thereunder are unaffected by these provisions (*Connecticut Fire Ins. Co. v. Manning*, 160 Fed. 382, 87 C. C. A. 334, 15 Ann. Cas. 338).

5. EFFECT OF MISREPRESENTATION OR BREACH OF WARRANTY AS DEPENDENT ON TIME AND CIRCUMSTANCES

1199-1200. (c) Statements made after issuance of the policy

1199 (c). Misstatements made in good faith after issuance and delivery of a policy of burglary insurance do not affect the insured's rights (*Ætna Accident & Liability Co. v. White* [Tex. Civ. App.] 177 S. W. 162).

6. CONCEALMENT AND ITS EFFECT ON THE POLICY

1204. (a) Concealment defined

1204 (a). "Concealment" is an intentional withholding of any fact material to the risk which the insured in good faith ought to communicate (*Connecticut Fire Ins. Co. v. Colorado Leasing, Min. & Mill. Co.*, 116 Pac. 154, 50 Colo. 424, Ann. Cas. 1912C, 597). So, where letter sent with policy asked for additional information, response thereto by brokers with knowledge and consent of insured was essentially part of written application, and fraud perpetrated therein would avoid policy (*St. Paul Fire & Marine Ins. Co. v. Garnier* [Tex. Civ. App.] 196 S. W. 980). In *California Reclamation Co. v. New Zealand Ins. Co.*, 138 Pac. 960, 23 Cal. App. 611, however, general insurance brokers, who placed part of a risk with the defendant insurer, were held to be the agents of defendant, and their concealment did not avoid the policy.

1204-1206. (b) Duty to make disclosure

1205 (b). The law of England, as of other countries, requires an applicant for marine insurance to make a full disclosure of all the material facts, known to him at the time, affecting the risk which the insurer is to assume (*Northwestern S. S. Co. v. Maritime Ins. Co.* [C. C.] 161 Fed. 166).

1206-1207. (c) Same—Knowledge of facts

1206 (c). The applicant is not, of course, required to disclose facts not known to him, and concealment cannot be predicated on a failure to disclose facts of which he is ignorant.

North British Mercantile Ins. Co. v. Union Stockyards Co., 87 S. W. 285, 27 Ky. Law Rep. 852, 120 Ky. 465; *Northwestern S. S. Co. v. Maritime Ins. Co.* (C. C.) 161 Fed. 166; *El Dia Ins. Co. v. Sinclair*, 228 Fed. 833, 143 C. C. A. 231.

1207-1208. (d) Same—Materiality of facts

1207 (d). The duty to disclose is, of course, limited to material facts (*Northwestern S. S. Co. v. Maritime Ins. Co.* [C. C.] 161 Fed. 166); and it should appear that the insured knew, or that the circumstances were such that an ordinarily prudent person would know, that the fact was material (*Continental Ins. Co. v. Ford*, 140 Ky. 406, 131 S. W. 189). "Material facts" are only such as are likely to influence the mind of a reasonable under-

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writer in deciding whether to accept the risk and in fixing the rate of premium to be charged, and the question of materiality is one of fact to be decided upon consideration of all the circumstances and conditions affecting the transaction (*Northwestern S. S. Co. v. Maritime Ins. Co.* [C. C.] 161 Fed. 166).

**1212-1214. (h) Duty to disclose as dependent on character of facts
—Facts known to insurer**

1212 (h). The duty to disclose does not impose on the applicant an obligation to disclose matters of common and general knowledge among those engaged in the insurance business at the place of contract (*Northwestern S. S. Co. v. Maritime Ins. Co.* [C. C.] 161 Fed. 166).

1214-1216. (i) Necessity of making inquiry and effect of failure to inquire

1215 (i). The insured may assume that the insurer made inquiries relating to every material fact affecting the risk (*Continental Ins. Co. v. Ford*, 140 Ky. 406, 131 S. W. 189).

1220-1221. (n) Effect of concealment as dependent on materiality of facts concealed

1221 (n). In order to predicate concealment on failure to disclose, it must appear that the undisclosed fact was material.

Connecticut Fire Ins. Co. v. Colorado Leasing, Min. & Mill. Co., 116 Pac. 154, 50 Colo. 424, Ann. Cas. 1912C, 597; *Continental Ins. Co. v. Ford*, 140 Ky. 406, 131 S. W. 189; *British & Foreign Marine Ins. Co., Limited, of Liverpool v. Cummings*, 113 Md. 350, 76 Atl. 571; *Niagara Fire Ins. Co. v. Layne*, 185 S. W. 1136, 170 Ky. 339.

1222-1224. (o) Effect of concealment as dependent on knowledge and intent of applicant

1222 (o). In order to avoid the policy, the concealment must be intentional and fraudulent.

Connecticut Fire Ins. Co. v. Colorado Leasing, Min. & Mill. Co., 116 Pac. 154, 50 Colo. 424, Ann. Cas. 1912C, 597; *Continental Ins. Co. v. Ford*, 131 S. W. 189, 140 Ky. 406; *Brunswick-Balke-Collender Co. v. Northern Assur. Co.*, 105 N. W. 76, 142 Mich. 29.

1225-1226. (q) Evidence

1225 (q). The sufficiency of the evidence to show a concealment, where there was no inquiry, is considered in *Connecticut Fire Ins. Co. v. Colorado Leasing, Min. & Mill. Co.*, 50 Colo. 424, 116 Pac. 154, Ann. Cas. 1912C, 597.

1226-1227. (r) Questions for jury and instructions

1226 (r). Where the materiality of facts withheld by insured in a fire insurance policy stipulating that it shall be void if insured conceals any material fact is not fixed by any writing, the materiality, together with the fraudulent intent of insured, must be determined by the jury from the circumstances (*Connecticut Fire Ins. Co. v. Colorado Leasing, Min. & Mill. Co.*, 116 Pac. 154, 50 Colo. 424, Ann. Cas. 1912C, 597).

7. PERSONS AFFECTED BY MISREPRESENTATION, BREACH OF WARRANTY, OR CONCEALMENT**1228-1229. (b) Rights of mortgagee under "union mortgage clause"**

1228 (b). A policy of insurance in the standard form, void as to the insured, because of misrepresentation or breach of warranty, may be valid as to a mortgagee when the mortgagee clause in the usual form is attached to the policy.

Reed v. Fireman's Ins. Co. of Newark, 81 N. J. Law, 523, 80 Atl. 462;
Firemen's Ins. Co. v. Boland, 30 Ohio Cir. Ct. R. 811.

The Mississippi statute (Code 1906, § 2596) requires to be attached to each fire policy taken out by a mortgagor a clause that any loss or damage under the policy shall be payable to the mortgagee as his interest may appear, and that the insurance as to his interest shall not be invalidated by any act or neglect of the mortgagor or owner. It has been held that the section automatically writes itself into every insurance contract, where the insurance company allows a mortgage clause to be inserted, and makes a new and independent contract between the mortgagee and insurance company in no way dependent upon the original policy between the owner and insurer, which would not be invalid even if the original policy was void from its inception, and would be unaffected by any conditions which would invalidate the policy as to the mortgagor whether prior or subsequent to the insertion of the mortgage clause, and hence, where an original policy was void because taken by a husband in his own name on a homestead owned by the wife, he representing that he was the sole and unconditional owner, the validity of a contract between insurer and the subsequent mortgagee of the premises formed by attaching a mortgage clause to the policy was not affected thereby, and the mortgagee might recover as to his interest irrespective of conditions imposed upon the owner by the policy (*Bacot v. Phoe-*

nix Ins. Co. of Brooklyn, 96 Misc. 223, 50 South. 729, 25 L. R. A. [N. S.] 1226, Ann. Cas. 1912B, 262). So, too, in *People's Sav. Bank v. Retail Merchants' Mut. Fire Ins. Ass'n*, 146 Iowa, 536, 123 N. W. 198, 31 L. R. A. (N. S.) 455, where the policy, when issued by defendant, provided that loss, if any, was payable to the mortgagee, and that 15 days' notice of any delinquency of the assured would be given to him before any suspension or cancellation affecting his interest, it was held that the consideration which supported the policy also supported the contract between defendant and plaintiff, and secured to plaintiff a right to recover regardless of any breaches of the contract by the owner, such as a false statement as to ownership, unknown to plaintiff; the default of the owner in misstating the nature of his title being a "delinquency" within the meaning of the clause, "delinquency" being defined by Webster as "a failure or omission of duty, a fault, a misdeed, an offense, a misdemeanor, a crime," and a "delinquent" being described as one "failing in duty; offending by neglect of duty."

In *Young Men's Lyceum of Tarrytown v. National Ben Franklin Fire Ins. Co. of Pittsburgh, Pa.*, 177 App. Div. 351, 163 N. Y. Supp. 226, a protective warranty in a policy of fire insurance that insured stipulated that property was located not less than 500 feet from public fire hydrant was held binding upon a mortgagee.

**8. EFFECT OF CONCEALMENT, MISREPRESENTATION, OR
BREACH OF WARRANTY IN MARINE POLICIES
IN GENERAL**

1233-1236. (a) In general

1235 (a). A provision in a marine policy reading, "Vessel warranted employed in the general passenger and freighting business on Puget Sound," relates to present and not future employment; and the fact that the vessel was out of commission at the time of a loss is not a breach of such warranty, which will defeat a recovery on the policy (*Independent Transp. Co. v. Canton Ins. Office* [D. C.] 173 Fed. 564).

However, that a cargo of lumber, the true measurement of which was stated in a marine policy, was understated in the bill of lading is not a defense to an action on the policy (*Granger v. Providence-Washington Ins. Co.*, 200 Fed. 730, 119 C. C. A. 174, reversing [D. C.] 192 Fed. 674).

1242-1243. (g) Character of cargo in general

1242 (g). A provision that insurance of freightage was to be subject to satisfactory survey and loading by the surveyor of the board of underwriters requires only that it be satisfactory to the surveyor, and not that his certificate be submitted to and approved by the insurer (*Victoria S. S. Co. v. Western Assur. Co. of Toronto*, 167 Cal. 348, 139 Pac. 807).

1243-1246. (h) Nationality and neutrality of cargo

1244 (h). In *Northwestern S. S. Co. v. Maritime Ins. Co. (C. C.)* 161 Fed. 166, the facts were these: Defendant insured a vessel against war risks on a voyage from Seattle to Vladivostok during the war between Russia and Japan. She carried a cargo consisting principally of salt beef and was captured by a Japanese vessel, her cargo condemned as contraband of war, and herself as prize. She cleared for Shanghai, a neutral port, and carried documents showing that as her destination, but her bill of lading and other papers showed her to be an American merchant vessel, the true nature of her cargo and her true destination, and she was not condemned for lack of such documents. It was held that the nature of the cargo, the intended clearance for Shanghai, and the carrying of false documents were not matters material to be disclosed to defendant when the insurance was obtained, and the fact that they were not so disclosed did not invalidate the policy in view of the facts that the cargo was known to defendant to be of a character which would probably be treated as contraband in case of capture, that the policy contained express permission for the ship to run a blockade, and that the measures taken to conceal her destination did not increase the risk but lessened it, and if known would not have influenced a reasonable underwriter to decline it.

1247-1249. (k) Title or interest of insured—Incumbrances—Other insurance

1249 (k). Where a towing company insured a cargo of corn under a policy issued to it "on account of whom it may concern," and the owner of the cargo also had it insured, in the absence of adoption by the owner of the towing company's insurance, or unless it was within the contemplation of the towing company that the owner should receive the insurance, the policy issued to such company did not inure to the benefit of the owner, so as to result in double insurance (*Western Assur. Co. v. Chesapeake Lighterage & Towing Co.*, 105 Md. 232, 65 Atl. 637, 11 Ann. Cas. 956).

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1249-1250. (l) Pleading

1250 (l). A complaint on a marine policy need not negative facts showing observance of a warranty that the goods were free from claim on account of capture by any belligerent nation; that being defensive matter (*Kuh v. British America Assur. Co.*, 112 N. Y. Supp. 410, 59 Misc. Rep. 589, judgment reversed 130 App. Div. 38, 114 N. Y. Supp. 268).

1252-1253. (p) Questions for jury and instructions

1253 (p). Instructions as to concealment which would avoid a marine policy were considered and held proper in *St. Paul Fire & Marine Ins. Co. v. Balfour*, 168 Fed. 212, 93 C. C. A. 498.

9. WARRANTY OF SEAWORTHINESS AND EFFECT OF BREACH THEREOF

1253-1254. (a) Nature of warranty in general

1253 (a). Except where the vessel is at sea at the inception of the risk, there is an implied warranty of seaworthiness in time policies, satisfied if the vessel be staunch and properly equipped to meet the ordinary perils of the voyage (*Plummer v. Insurance Co. of North America*, 95 Atl. 605, 114 Me. 128).

1257-1259. (d) Scope of warranty

1257 (d). In every insurance upon a vessel there is an implied warranty on the part of the assured that at the time of sailing the vessel shall be seaworthy for the voyage insured, which extends not only to the hull, but if a sailing vessel to the sails and rigging (*Stetson v. Insurance Co. of North America* [D. C.] 215 Fed. 186). In *Thames & Mersey Marine Ins. Co. v. Pacific Creosoting Co.*, 223 Fed. 561, 139 C. C. A. 101, affirming *Pacific Creosoting Co. v. Thames & Mersey Marine Ins. Co.* (D. C.) 210 Fed. 958, a cargo policy was held to imply no warranty on the part of the insured of the seaworthiness of a lighter used in discharging the cargo at the end of the voyage.

1271-1272. (p) Questions of practice—Burden of proof

1271 (p). Ordinarily seaworthiness at the inception of a risk is presumed, but where a vessel founders without any stress of weather or unusual buffeting or other extraordinary peril, the burden of showing seaworthiness is on the assured (*Plummer v. Insurance Co. of North America*, 95 Atl. 605, 114 Me. 128).

1272-1273. (q) Same—Admissibility and sufficiency of evidence

1272 (q). In an action on a policy insuring a barge, which made the seaworthiness of the barge at the time of the issuance of the policy a condition precedent to the attaching of the policy, evidence that insured was induced to purchase the barge and to take out the policy by a report made by the insurer, after an examination of the barge, to the effect that the same was seaworthy, was admissible as tending to show that the insurer had admitted the seaworthiness at the issuance of the policy (*Paddock-Hawley Iron Co. v. Providence-Washington Ins. Co.*, 93 S. W. 358, 118 Mo. App. 85). Under Civ. Code, Cal. §§ 2681, 2682, in action on marine insurance policy, evidence that vessel had been injured in collision is admissible as tending to show breach of implied warranty that vessel was seaworthy (*California Canneries Co. v. Canton Ins. Office*, 25 Cal. App. 303, 143 Pac. 549).

1273-1274. (r) Same—Trial and review

1273 (r). In an action on a policy of marine insurance, the seaworthiness of the lighter in which the cargo insured was loaded is, under the evidence, a question for the jury (*Western Assur. Co. v. Chesapeake Lighterage & Towing Co.*, 105 Md. 232, 65 Atl. 637, 11 Ann. Cas. 956).

10. EFFECT OF MISDESCRIPTION OF PROPERTY INSURED IN GENERAL

1274-1277. (a) Matter of description as warranty or representation

1275 (a). An answer, in an application for fire insurance, made a part of the policy, as to the dimensions of the insured building, is not within the warranty thereof as to the truthfulness of the answers touching a "description and statement of the condition, situation, value, occupation and title of the property" (*National Mut. Fire Ins. Co. v. Duncan*, 44 Colo. 472, 98 Pac. 634, 20 L. R. A. [N. S.] 340).

1277-1278. (b) Description of building insured

1277 (b). The misrepresentation, in an application for fire insurance, that the building was 20 by 30 feet, when it was 16 by 24 feet, does not of itself appear material to the risk, and so avoid the policy; but the answer, relying on it as a defense, must state facts showing its materiality, that insured was influenced thereby in is-

suing the policy, or was injured thereby (*National Mut. Fire Ins. Co. v. Duncan*, 44 Colo. 472, 98 Pac. 634, 20 L. R. A. [N. S.] 340).

1278. (c) Same—Location

1278 (c). Error in the description in a fire policy of the insured property as being in section 11, instead of section 2, will not vitiate the policy, where there is sufficient in it pointing out the insured property to authorize parol evidence identifying it with that destroyed, and it appears that section 2 adjoined section 11 on the north, though the policy provides that it shall be void if insured has misrepresented any material fact or circumstance concerning the subject-matter (*Shivers v. Farmers' Mut. Fire Ins. Co.*, 99 Miss. 744, 55 South. 965, 35 L. R. A. [N. S.] 789).

1282-1283. (f) Description of personal property

1283 (f). It was a material misrepresentation as to the identity of the insured property in the application for insurance on an automobile that it was a 1907 model, where it was in fact a 1906 model, rendering recovery on the policy impossible (*Harris v. St. Paul Fire & Marine Ins. Co.* [Sup.] 126 N. Y. Supp. 118). So, when it was stated to be a 1910 model, when it was a 1907 model (*Smith v. American Automobile Ins. Co.*, 188 Mo. App. 297, 175 S. W. 113), or a 1910 model, when in fact it was a car built in 1906 (*Reed v. St. Paul Fire & Marine Ins. Co.*, 165 App. Div. 660, 151 N. Y. Supp. 274). However, where policies on automobiles employed many accurate terms of description, it might be found that incorrect description as to year of model was not material (*Locke v. Royal Ins. Co.*, 220 Mass. 202, 107 N. E. 911); and a car purchased by plaintiff's employer and delivered to plaintiff upon payment two months afterwards is new and not secondhanded, within an insurance policy covering theft (*Rabinowitz v. Vulcan Ins. Co.* [N. J.] 100 Atl. 175).

Whether applicant represented that automobile was 1910 model, or merely that he bought it for a 1910 model is immaterial so far as avoidance of policy was concerned (*Smith v. American Automobile Ins. Co.*, 188 Mo. App. 297, 175 S. W. 113).

A statement in the application that the insured property had not been used more than seven years was false so as to invalidate the policy, where the application also stated that "seasons in use mean all seasons since first use," and the property was first used more than seven years before (*Craddock, Vinson & Co. v. Connecticut Fire Ins. Co.*, 169 S. W. 1015, 160 Ky. 519).

Where a policy written and issued by an agent with power to represent the company does not correctly describe the property and insured has not concealed or misrepresented any fact, the misdescription does not render the policy void (*Dodge v. Grain Shippers' Mut. Fire Ins. Ass'n*, 176 Iowa, 316, 157 N. W. 955).

1283-1284. (g) Same—Location

1283 (g). Where maps and ratebooks on which a policy of reinsurance was based showed a warehouse and an elevator, and prescribed different rates of premium for property insured in such buildings, a representation in the application for such reinsurance that the property insured was contained in the warehouse, which was entitled to the lower rate of insurance, when, in fact, it was in the elevator, was a material misrepresentation avoiding the policy (*Fireman's Fund Ins. Co. v. Aachen & Munich Fire Ins. Co.*, 84 Pac. 253, 2 Cal. App. 690).

1285-1286. (i) Pleading and practice

1285 (i). Under the evidence in an action on a burglary insurance policy it was a question for the jury whether the warranty that a summer cottage was a private residence was false (*Bemis v. Pacific Coast Casualty Co.*, 125 Minn. 54, 145 N. W. 622).

11. EFFECT OF MISREPRESENTATION, BREACH OF WARRANTY, OR CONCEALMENT AS TO USE AND OCCUPANCY OF PREMISES

1287-1288. (a) Effect of false statements in general

1288 (a). Where plaintiff, in applying for fire insurance on a barn, represented that it was a stock barn, and not a tobacco barn, and was not to be used as a tobacco barn during the term of the policy, and but for such representations the company would not have written the policy, recovery cannot be had thereon; it providing that any fraud of insured shall forfeit all claim against the company (*Moss v. Home Ins. Co. of New York*, 99 S. W. 308, 30 Ky. Law Rep. 630). So, where plaintiff represented he was a mining promoter, when in fact he was a clairvoyant, and used his apartment for telling fortunes, a burglary policy covering the apartment, procured by such misrepresentations, was void (*Reese v. Fidelity & Deposit Co. of Maryland*, 156 N. Y. Supp. 408, 93 Misc. Rep. 31).

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1289-1291. (c) Effect of false statement or concealment as dependent on intent and materiality

1289 (c). Under a policy insuring a building "occupied as a contagious hospital," insurer is liable, although it had no patients, and not even a caretaker in occupation, in the absence of any evidence that its condition increased the risk (*City of Fall River v. Ætna Ins. Co.*, 219 Mass. 454, 107 N. E. 367).

1294-1296. (e) Truth or falsity of statements as to use and occupancy—Dwelling house

1295 (e). The words "warranted by the assured that the within described building is occupied exclusively for dwelling purposes by not more than two families," stamped on the face of the policy, mean that the building was used exclusively for dwelling purposes (*De Noyelles v. Delaware Ins. Co. of Philadelphia*, 138 N. Y. Supp. 855, 78 Misc. Rep. 649). On the other hand, an application describing the property as a "combined rooming and frame dwelling house," having 24 rooms, shows that insured did not represent the building as an ordinary dwelling (*Arkansas Mut. Fire Ins. Co. v. Claiborne*, 82 Ark. 150, 100 S. W. 751).

In *Milwaukee Mechanics' Ins. Co. v. Fuquay*, 120 Ark. 330, 179 S. W. 497, it was held that a policy on a house insured as a dwelling house, absent provision in the policy, is not voided by insured keeping private boarders therein.

A policy, describing the property insured as a dwelling house, did not cover a building in which the basement was used as a shoe store, the first floor as a dry goods store, and the upstairs for dwelling purposes (*Bowditch v. Norwich Union Fire Ins. Soc.*, 79 N. E. 788, 193 Mass. 565).

1296-1297. (g) Pleading and practice

1297 (g). In an action on a policy insuring a "dwelling house," the burden was on plaintiff to show that the building insured and burned was in fact a dwelling house (*Harris v. North American Ins. Co.*, 77 N. E. 493, 190 Mass. 361, 4 L. R. A. [N. S.] 1137). But an insurer seeking to defeat a recovery on a fire policy on a building described as a dwelling house on the ground that the building was used for factory purposes, and that the insurer did not insure buildings used for factory purposes, has the burden of proving that insured knew at the time of the issuance of the policy that the building was used as a factory (*Bailey v. Liverpool & London & Globe Ins. Co.*, 149 S. W. 1169, 166 Mo. App. 593).

In an action on fire policy covering plaintiff's barn, question of custom to use gasoline engines in threshing in the barn and its bearing on the case, if shown, is for the jury (*Bouchard v. Dirigo Mut. Fire Ins. Co.*, 96 Atl. 244, 114 Me. 361).

13. EFFECT OF MISREPRESENTATION OR BREACH OF WARRANTY AS TO AMOUNT AND VALUE OF INSURED PROPERTY

**1313-1314. (c) Statements of value as warranties or representations
—Value as matter of opinion**

1313 (c). In an application for fire insurance, statements as to the age and value of the buildings are expressions of opinion, not warranties (*Home Ins. Co. of New York v. Overturf*, 74 N. E. 47, 35 Ind. App. 361). But, even if the statement of insured as to the value of the property be merely his estimate, the application reciting, "the value * * * being estimated by the applicant," yet he, having warranted his statements to be true, is required to state the value with a reasonable degree of accuracy, which is not the case where the value is \$200 and the statement \$1,500 (*National Mut. Fire Ins. Co. v. Duncan*, 44 Colo. 472, 98 Pac. 634, 20 L. R. A. [N. S.] 340).

1314. (d) Effect of overvaluation

1314 (d). Where insured warranted that the automobile was new when purchased and that it had cost him a certain sum, both of which statements were false, the falsity avoided the policy (*Miller v. Commercial Union Assur. Co.*, 125 Pac. 782, 69 Wash. 529). In *Craddock, Vinson & Co. v. Connecticut Fire Ins. Co.*, 169 S. W. 1015, 160 Ky. 519, a false statement in the application to the effect that the insured property cost \$1,200 in cash, instead of only \$250 not in cash, was held to invalidate the policy.

Where a provision of the constitution of a mutual insurance society required an appraisal of the property insured to be made by trustees for the purpose of protecting the company against overinsurance or fraud, a new appraisal was not a condition precedent to the validity of an oral contract for insurance in favor of a transferee of the property, which had been appraised but a short time previously by insurer for the purpose of issuing a policy which became void by the transfer of the title; it not appearing that there had been any deterioration in the value or that there

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was any present necessity for another appraisalment (Posey County Fire Ass'n v. Hogan, 77 N. E. 670, 37 Ind. App. 573).

1314-1316. (e) Same—Materiality—Open or valued policies

1315 (e). If a policy is not a valued policy, false statements as to the value of the property cannot be regarded as material to the risk, but as relevant only to the question of fraud and false swearing in general. On the other hand, in the case of a valued policy false statements as to value of the property insured are obviously material, and avoid the policy, unless it appears that they are the result of a mere error in judgment (Delaware Ins. Co. v. Hill [Tex. Civ. App.] 127 S. W. 283).

In Kentucky Live Stock Ins. Co. v. McWilliams, 190 S. W. 697, 173 Ky. 92, it was stated that the material question in fixing insurable value of live stock is not the price paid, but its true value, so that, where the statement that the value of a horse was \$1,200 was in no way contradicted, the fact that the owner falsely stated that he paid \$1,100 for it was not material.

1316-1318. (f) Same—Intent of insured

1316 (f). A false statement as to value, knowingly and purposefully made, avoids the policy.

Post v. American Cent. Ins. Co., 51 Pa. Super. Ct. 352; St. Paul Fire & Marine Ins. Co. v. Garnier (Tex. Civ. App.) 196 S. W. 980; Atlas Ins. Co. v. Robison, 94 Ark. 390, 127 S. W. 456; Ledford v. Hartford Fire Ins. Co., 161 Ill. App. 233

In order to establish a fraudulent overvaluation of property insured by a valued policy, it must either be shown that the insured knew that the property was worth less, or the actual value must be so much less, than that stated as to warrant a presumption that it was intentional; the mere fact that the property was worth less than the amount stated being insufficient (Delaware Ins. Co. v. Hill [Tex. Civ. App.] 127 S. W. 283). So the padding of an inventory of merchandise by false entries will work a forfeiture of the policy, where they cannot be explained on any reasonable theory of honest mistake (Alfred Hiller Co. v. Insurance Co. of North America, 52 South. 104, 125 La. 938, 32 L. R. A. [N. S.] 453).

1317 (f). An overvaluation, made honestly and in good faith, will not as a rule avoid the policy (Atlas Ins. Co. v. Robison, 94 Ark. 390, 127 S. W. 456). So policies on the machinery of an ice plant are not void for fraud and overvaluation of the property

insured, where there was no intentional deception by the insured, who had no knowledge of the value except from its cost, which was approximately the value given, and the estimate was made by the engineer who installed the machinery, and it was also examined by the agents of the insurers before writing the policies (*Rochester German Ins. Co. v. Schmidt* [C. C.] 151 Fed. 681).

1318. (g) Same—Statutory provisions limiting effect of false statements

1318 (g). Misrepresentation by an insured as to the value of a building and personal property therein will not avoid the policy in view of the Texas statute (Acts 1903, c. 69), declaring that misrepresentations neither material to the risk nor contributing to the loss shall be no defense to a suit upon an insurance policy.

Co-operative Ins. Ass'n of San Angelo v. Ray (Tex. Civ. App.) 138 S. W. 1122; *Indiana & Ohio Live Stock Ins. Co. v. Smith* (Tex. Civ. App.) 157 S. W. 755; *Camden Fire Ins. Ass'n of Camden, N. J., v. Puett* (Tex. Civ. App.) 164 S. W. 418.

So, under Rev. St. Mo. 1909, § 7030, fraudulent overvaluation by insured in a fire policy is not available to insurer as a defense to an action on the policy (*Farber v. American Automobile Ins. Co.*, 177 S. W. 675, 191 Mo. App. 307).

1320-1323. (k) What constitutes an overvaluation

1322 (k). Though the statement, in an application for insurance, made a warranty and part of the contract, as to the cash value of the insured building, is one that has only to be substantially true, there often being a marked difference of opinion as to value of property, so that it is enough that the valuation given appears to be a fair and reasonably truthful one, yet such rule is not satisfied when the value is only \$200, and is stated to be \$1,500 (*National Mut. Fire Ins. Co. v. Duncan*, 44 Colo. 472, 98 Pac. 634, 20 L. R. A. [N. S.] 340). In *Capital Fire Ins. Co. v. King*, 82 Ark. 400, 102 S. W. 194, it appeared that the insured warranted that the policy should be void if he concealed or misrepresented any material fact concerning the insurance or subject thereof, or in case of any fraud or false swearing touching the insurance or the subject thereof before or after loss. Among the questions asked in the application was the cost of the house insured, which insured answered as \$2,000. The house was destroyed, and in an action on the policy he testified that the house cost \$1,700. It

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was held that such evidence constituted a breach of warranty avoiding the policy.

1324-1325. (m) Questions of practice—Evidence

1325 (m). The burden of proof on an issue of overvaluation is on the insurer (*Delaware Ins. Co. v. Hill* [Tex. Civ. App.] 127 S. W. 283).

The sufficiency of the evidence on an issue as to false statements as to value is considered in *Helm v. Anchor Fire Ins. Co.*, 132 Iowa, 177, 109 N. W. 605; *Nerger v. Equitable Fire Ass'n*, 107 N. W. 531, 20 S. D. 419; *Horwitz v. United States Fidelity & Guaranty Co.*, 95 Wash. 455, 164 Pac. 77; *Henry Clay Fire Ins. Co. v. Barkley*, 169 S. W. 747, 160 Ky. 153.

1326. (n) Same—Trial and review

1326 (n). The question of overvaluation is ordinarily for the jury (*Laird v. Piedmont Mut. Fire Ins. Co.*, 82 S. C. 424, 64 S. E. 404). But the question is for the court, where the facts are admitted by a demurrer to an answer alleging overvaluation to defeat the policy (*Slafter v. Concordia Fire Ins. Co.*, 142 Iowa, 116, 120 N. W. 706).

14. EFFECT OF CONCEALMENT, MISREPRESENTATION, OR BREACH OF WARRANTY OR CONDITION AS TO TITLE TO OR INTEREST IN PROPERTY INSURED

1330-1332. (c) Stipulations in the nature of conditions precedent—Condition as to sole and unconditional ownership

1331 (c). The condition as to sole and unconditional ownership refers to the ownership at the date of the policy.

Downs v. German Alliance Ins. Co., 6 Pennewill (Del.) 166, 67 Atl. 146;
Fidelity-Phoenix Fire Ins. Co. v. O'Bannon (Tex. Civ. App.) 178 S. W. 731.

A clause of a fire insurance policy, that the insurance should be void if on a building on ground not owned by the insured in fee simple, did not apply, where the insurance was on lumber in a building in process of demolition and not part of the real estate (*Ensel v. Lumber Ins. Co. of New York*, 88 Ohio St. 269, 102 N. E. 955). So, mixing of lumber illegally cut with lumber owned by the insured, valued at more than the amount of the policy, in the absence of fraud or knowledge, does not avoid the policy for failure of insured's sole and unconditional ownership of the property (*First*

Nat. Bank v. *Ætna Ins. Co.*, 188 Mich. 251, 153 N. W. 1063; *Same v. Caledonian Ins. Co.*, 188 Mich. 254, 153 N. W. 1064).

In a policy covering either real or personal property, provision avoiding it if insured's interest was other than unconditional and sole ownership has been held not to apply to buildings constituting real estate (*Scott v. Liverpool & London & Globe Ins. Co.*, 102 S. C. 115, 86 S. E. 484). "Property," in fire insurance policy providing that it should be void "if the interest of the insured in the property be not truly stated," meant the property in fact protected by the policy (*Tebeau v. Globe & Rutgers Fire Ins. Co.*, 271 Mo. 626, 197 S. W. 130). It was therefore stated in the same case that the phrase "interest of the insured," in policy providing it should be void if interest of insured be other than unconditional ownership, or if subject of insurance be building on ground not owned by insured in fee simple, meant only interest of insured in property insured.

1332-1334. (d) Necessity of disclosure of title or interest

1332 (d). An applicant for a fire policy must disclose the nature of his title.

In re Millers' & Manufacturers' Ins. Co., 106 N. W. 485, 97 Minn. 98, 4 L. R. A. (N. S.) 231, 17 Ann. Cas. 1144; *Hamilton v. Fireman's Fund Ins. Co.* (Tex. Civ. App.) 177 S. W. 173.

Where a fire insurance company attached an ordinary household furniture clause to a policy, there was no misrepresentation on the part of the insured, though he did not have articles mentioned in the clause, or, having them, had no insurable interest therein, for that clause is attached to such policies for the convenience of the insurer, regardless of whether the insured has all the articles enumerated (*German Union Fire Ins. Co. v. Cohen*, 78 Atl. 911, 114 Md. 130).

Where no questions were asked insured as to his title to the property when insurance thereof was effected, and he made no representations at any time, insurer could not defeat a recovery on the ground of material differences between the property as represented by insured and as it really existed (*Fadden v. Phoenix Ins. Co.*, 77 N. H. 392, 92 Atl. 335).

1334-1336. (e) Same—Under provisions of policy

1334 (e). Under a condition that if the insured is not the sole, entire, and unconditional owner the policy shall be void, a failure to disclose the real state of the title, if not sole, etc., is fatal, though

1336-1338 AVOIDANCE OF CONTRACT—INSURANCE OF PROPERTY

such failure is unintentional (*Rochester German Ins. Co. v. Schmidt*, 162 Fed. 447, 89 C. C. A. 333, reversing [C. C.] 151 Fed. 681).

1336-1338. (f) Effect of false statements, concealment, or breach of condition in general

1336 (f). A false statement as to the title or interest of the insured in the property covered by the policy avoids the contract.

Johnson v. Sun Fire Ins. Co., 60 S. E. 118, 3 Ga. App. 430; *Wilson v. Germania Fire Ins. Co.*, 140 Ky. 642, 131 S. W. 785; *Millson v. Mutual Cash Guaranty Fire Ins. Co.*, 24 S. D. 285, 123 N. W. 839, 140 Am. St. Rep. 788.

1337 (f). Where the policy is conditioned that it shall be void if the subject of the insurance is a building on ground not owned by the insured in fee simple, or if the interest of the insured is other than sole and unconditional ownership, a breach of such conditions avoids the policy.

Wyandotte Brewing Co. v. Hartford Fire Ins. Co., 144 Mich. 440, 108 N. W. 393, 6 L. R. A. (N. S.) 852, 115 Am. St. Rep. 458; *Groce v. Phoenix Ins. Co.*, 94 Miss. 201, 48 South. 298, 22 L. R. A. (N. S.) 732; *Seltz v. Scottish Union & National Ins. Co.*, 37 Pa. Super. Ct. 201; *Roper v. National Fire Ins. Co. of Hartford*, 76 S. E. 869, 161 N. C. 151; *Wilson v. Commercial Union Assur. Co.*, 90 Vt. 105, 96 Atl. 540; *Home Mut. Fire Ins. Co. v. Pittman*, 111 Miss. 420, 71 South. 739; *Merchants' & Bankers' Fire Underwriters v. Williams* (Tex. Civ. App.) 181 S. W. 859.

1338-1340. (g) Effect of false statements or concealment as dependent on materiality

1340 (g). Though the chief examiner of a fire insurance company testified directly that the risk covered by the policy would not have been accepted by the company had the true facts as to ownership been known to it, but there was other testimony tending to discredit him, the jury were not bound to believe him; and hence there was no error in charging that it was essential for the insurer to prove that it would not have accepted the risk had it known the true facts as to ownership (*Shawnee Fire Ins. Co. v. Chapman*, 63 Tex. Civ. App. 61, 132 S. W. 854).

Where the nature of a claim giving no insurable interest to a building is material to the risk on goods in such building, failure by insured to disclose the nature of his claim to the building will avoid the policy as to the goods (*Niagara Fire Ins. Co. v. Layne*, 162 Ky. 665, 172 S. W. 1090).

Where property owned by a wife was insured in the husband's name, finding that he did not misstate or fraudulently conceal any fact material to the risk was proper, where insurer made no inquiry respecting title, and no representation as to title was made (*Kludt v. German Mut. Fire Ins. Co.*, Auburn, Fond du Lac County, 140 N. W. 321, 152 Wis. 637, 45 L. R. A. [N. S.] 1131, Ann. Cas. 1914C, 609).

Where plaintiff, who had an insurable interest in lumber which he had contracted to sell, and for which he had received part of the purchase price, disclosed those facts to the insurer's agent upon making an application for a fire policy, his nondisclosure of the exact amount paid will not, where the agent made no inquiry as to that matter, avoid the policy (*Fuhrman v. Sun Ins. Office of London*, 180 Mich. 439, 147 N. W. 618, Ann. Cas. 1916A, 466).

1341-1342. (h) Effect of false statements as dependent on knowledge and intent of the insured

1341 (h). Insured's statement to agent that he had sold property to H. does not invalidate policy, he having been told by real estate agents that H. was the purchaser (*Camden Fire Ins. Ass'n v. Bomar* [Tex. Civ. App.] 176 S. W. 156).

15. CONSTRUCTION AND SUFFICIENCY OF DISCLOSURES AS TO TITLE TO OR INTEREST IN THE PROPERTY INSURED

1344-1345. (a) Sufficiency of disclosure in general

1345 (a). If the disclosure, though not full, is such as to put the insurer on inquiry, it is sufficient (*Wilson v. Germania Fire Ins. Co.*, 140 Ky. 642, 131 S. W. 785).

1347-1351. (c) Ownership which will support the policy—Absolute ownership and title in fee simple

1348 (c). Where an insured has a pecuniary interest in the property equal to or greater than the insurance, it is not material to the risk that another person has an interest in the property, or that the assured does not own the absolute title.

Hartford Fire Ins. Co. v. McClain (Ky.) 85 S. W. 699. And to the same effect, see *Wilson v. Germania Fire Ins. Co.*, 140 Ky. 642, 131 S. W. 785.

A provision in a policy, avoiding it if the building be on ground not owned by the insured in fee simple, refers to the title and own-

ership, and not to possession, and consequently a decree of divorce granted to insured's wife, which awarded her temporary possession of the property, subject to being required to vacate on remarriage or on subsequent order of the court, did not divest insured of his title thereto (*Hix v. Sun Ins. Co.*, 94 Ark. 485, 127 S. W. 737, 140 Am. St. Rep. 138).

1349 (c). A building being, under the provisions of the South Dakota statute (Civ. Code, § 188), deemed affixed to the land and part of the real estate, an insured is not the owner of a building situated on the patented mining claim of another in the absence of a showing of contract with, or estoppel of, the landowner, giving insured ownership of and right to remove the house (*Milison v. Mutual Cash Guaranty Fire Ins. Co.*, 24 S. D. 285, 123 N. W. 839, 140 Am. St. Rep. 788).

Where the building of insured was on a homestead, title to which was still in the United States, the entire burden of the loss in case of loss falls on the insured, and the government has no interest in the property destroyed, and suffers no loss on account thereof (*Allen v. Phoenix Assur. Co.*, 12 Idaho, 653, 88 Pac. 245, 8 L. R. A. [N. S.] 903, 10 Ann. Cas. 328).

1350 (c). In *McIntosh v. North State Fire Ins. Co.*, 152 N. C. 50, 67 S. E. 45, 136 Am. St. Rep. 818, the policy provided that it should be void if insured's interest was other than unconditional and sole ownership or the insured building was on ground not owned by insured in fee simple. The land on which the insured property was descended to the two daughters of insured's wife by a former marriage, she having a dower interest therein, and plaintiff after his marriage repaired the house insured on the land at his own expense. It was held that plaintiff had no legal or equitable estate in the land, so that the policy was void.

1351 (c). A pledgee of personal property is an "owner" thereof, within the meaning of an insurance policy (*Whelen v. Goldman*, 115 N. Y. Supp. 1006, 62 Misc. Rep. 108).

1353-1354. (c) Equitable title or interest

1354 (c). A condition that the insured shall have title to the property covered by the policy in fee simple is complied with by showing that he has the equitable title.

Case v. Meany, 165 Wis. 143, 161 N. W. 363; *Tebeau v. Globe & Rutgers Fire Ins. Co.*, 271 Mo. 626, 197 S. W. 130; *Cummings v. Dirigo Mut. Fire Ins. Co.*, 112 Me. 379, 92 Atl. 298; *National Union Fire*

Ins. Co. v. Burkholder, 116 Va. 942, 83 S. E. 404; *Arkansas Ins. Co. v. McManus*, 86 Ark. 115, 110 S. W. 797.

So one having an equitable title to land by virtue of a parol gift thereof to him, followed by his possession thereof and improvements thereon, is the owner within an application for a fire policy stating that he is the absolute owner, and is the owner in fee simple within a fire policy declaring that the same shall be void if the building be on ground not owned by the insured in fee simple (*Maas v. Anchor Fire Ins. Co.*, 111 N. W. 1044, 148 Mich. 432).

1354-1356. (f) Same—Vendee under contract of purchase

1355 (f). In *Fire Ass'n of Philadelphia v. American Cement Plaster Co.*, 37 Tex. Civ. App. 629, 84 S. W. 1115, it appeared that the defendant corporation contracted to purchase certain real estate and cement works thereon, with certain personal property, for the lump sum of \$4,500. \$2,500 was paid at the time of purchase. The deed was to be delivered on payment in full of the consideration. At the time defendant applied for insurance about \$1,000 of the consideration remained unpaid, but defendant claimed that, as the title to some of the land was defective, the amount paid was the reasonable value of the remaining property. It was held that, in the absence of proof as to the value of the personal property, etc., it could not be presumed that the difference between the amount paid and the price represented the value of the personal property, and that there was therefore no lien on the property insured, as represented by defendant, within a provision that the policy should be void if the insured's interest in the property was not truly stated.

1356 (f). In *Hartford Fire Ins. Co. v. McClain* (Ky.) 85 S. W. 699, the facts were these: A buyer of a stock of merchandise under an agreement that the business should be conducted in the name of the seller, who should hold the assets to indemnify him against loss by reason of debts contracted by the buyer, procured insurance on the property in the seller's name. The name of the beneficiary was not disclosed to the insurer. The insurer knew that the buyer and seller were both in control, and that the buyer was the one who actually attended to the store. It was held that the policy was valid, and the insurance, though in the name of the seller, must be held to be for the benefit of the buyer, as equitable owner, to the extent that the property exceeds the sum of the seller's liability for goods bought in his name by the buyer.

1356-1359 AVOIDANCE OF CONTRACT—INSURANCE OF PROPERTY

1356-1359. (g) Property subject to lien—Title of mortgagor or mortgagee

1357 (g). Where a fire policy on a bridge provided that it should be void if the interest of the insured in the property was not truly stated, the policy was not avoided by an undisclosed mortgage thereon (*Citizens' Mut. Fire Ins. Co. of Cecil County v. Conowingo Bridge Co.*, 113 Md. 430, 77 Atl. 378). So a policy, not mentioning incumbrances, but providing for fee-simple ownership, is not breached by existence of mortgage liens (*Terminal Ice & Power Co. v. American Fire Ins. Co.* [Mo. App.] 187 S. W. 564; *Same v. Home Ins. Co.*, Id. 568; *Same v. Lumbermen's Ins. Co.*, Id.; *Same v. Security Ins. Co.*, Id.; *Same v. Commercial Fire Ins. Co.*, Id. 569; *Same v. Stuyvesant Ins. Co.*, Id.).

1359 (g). Where the president of a bank loaned money of the bank, taking in his own name a note and a mortgage securing it on a stock of goods, depositing them in the bank, but did not make any formal transfer to the bank, his statement on applying for insurance on the goods, that his interest therein was that of a mortgagee was true.

Dalton v. Milwaukee Mechanics' Ins. Co., 102 N. W. 120, 126 Iowa, 377; *Same v. German Ins. Co. (Iowa)* 102 N. W. 1131; *Same v. Queen Ins. Co.*, Id.; *Same v. United States Fire Ins. Co.*, Id.; *Same v. Western Assur. Co.*, Id.; *Same v. Western Underwriters' Ass'n*, Id.

1360. (i) Property held in trust

1360 (i). A trustee of an express or implied trust may effect an insurance in his own name on the trust property for the benefit of the equitable owner, and, though the beneficiary is not disclosed, the policy is not repugnant to the clause therein concerning concealments or misrepresentations of material facts relating to the risk or to the interest of the assured (*Hartford Fire Ins. Co. v. McClain*, 85 S. W. 699, 27 Ky. Law Rep. 461).

1360-1363. (j) Leaseholds—Building on leased land

1361 (j). If the insured, though owning the building and contents, only leases the ground on which the building stands, the policy is void under the condition declaring that it shall be void if the subject of insurance be a building on ground not owned by the insured in fee simple.

Wyandotte Brewing Co. v. Hartford Fire Ins. Co., 144 Mich. 440, 108 N. W. 393, 6 L. R. A. (N. S.) 852, 115 Am. St. Rep. 458; *Parsons, Rich & Co. v. Lane*, 97 Minn. 98, 106 N. W. 485, 4 L. R. A.

(N. S.) 231, 7 Ann. Cas. 1144; *Beddall v. Citizens' Ins. Co.*, 28 Pa. Super. Ct. 600; *Clymer Opera Co. v. Rural Valley Mut. Fire Ins. Co.*, 50 Pa. Super. Ct. 645.

Where a fire policy provided that it should be void if the subject of insurance should be a building on ground not owned by insured in fee simple, and the application for insurance was oral, and neither insurer nor its agent had knowledge of the fact that the building insured was situated on ground leased by the insured, the policy was void, though insured had never read it and was ignorant of the clause in question (*Wyandotte Brewing Co. v. Hartford Fire Ins. Co.*, 108 N. W. 393, 144 Mich. 440, 6 L. R. A. [N. S.] 852, 115 Am. St. Rep. 458).

1362 (j). In *Roloff v. Farmers' Home Mut. Ins. Co.*, 130 Wis. 402, 110 N. W. 261, the facts were as follows: A. built a cheese factory on ground leased to him by C. so long as he should maintain a cheese factory thereon, and thereafter A. executed a land contract to plaintiff, wherein A. agreed to sell the building, and delivered the lease to plaintiff with C.'s consent. After plaintiff had completed his payments for the building he applied for insurance, the application stating that the property was not incumbered, and in response to a question, "State the value of the whole property including the land," stated, "Stands on leased ground." The application was made to an agent who knew the facts as to the lease. In an action on the policy, defendant contended that, inasmuch as the lease contained a prohibition against underleasing, such fact enhanced the risk. It was held that plaintiff was entitled to recover, since he became the assignee of the lease so that his statement was strictly true, even construed as declaring that the ground was leased to him, and since, if defendant was interested to know more of the terms of the lease, the duty was upon it to inquire.

1363-1364. (k) Property held under joint or several title

1363 (k). A policy insuring the "Crawfordsville Sanitarium" against loss or damage by fire to certain personal property was not void because the property was owned distributively by certain of the persons doing business under such trade-name, each of whom had an insurable interest therein (*New Hampshire Fire Ins. Co. v. Wall*, 75 N. E. 668, 36 Ind. App. 238).

**16. WHAT CONSTITUTES BREACH OF CONDITION AS TO SOLE
AND UNCONDITIONAL OWNERSHIP OF PROPERTY
INSURED**

1369-1370. (a) Construction of phrase "sole and unconditional ownership"

1369 (a). A provision of a policy that it shall be void unless otherwise provided by agreement indorsed thereon if the interest of the insured be other than unconditional and sole ownership is reasonable and valid.

Insurance Co. of North America v. Erickson, 39 South. 495, 50 Fla. 419, 2 L. R. A. (N. S.) 512, 111 Am. St. Rep. 121, 7 Ann. Cas. 495; *Groce v. Phoenix Ins. Co.*, 94 Miss. 201, 48 South. 298, 22 L. R. A. (N. S.) 732; *Bacot v. Phenix Ins. Co.*, 96 Miss. 223, 50 South. 729, Ann. Cas. 1912B, 262, 25 L. R. A. (N. S.) 1226; *Shoucair v. North British & Mercantile Ins. Co.*, 16 N. M. 563, 120 Pac. 328; *Rochester German Ins. Co. of Rochester, N. Y., v. Schmidt*, 162 Fed. 447, 89 C. C. A. 333, reversing (C. C.) 151 Fed. 681.

The clause refers to the title and ownership of the property and not to the mere possession (*Hix v. Sun Ins. Co.*, 94 Ark. 485, 127 S. W. 737, 140 Am. St. Rep. 138). And moreover it refers to the condition of the title at the date of the policy (*Downs v. German Alliance Ins. Co.*, 6 Pennewill [Del.] 166, 67 Atl. 146). The purpose in requiring the insured to have the sole and unconditional ownership of the insured property is to give protection only to those upon whom the loss insured against would inevitably fall, but for the insurance, and to avoid taking risks for those whose lack of interest or whose contingent interest in the property might tend to encourage carelessness or wrongdoing in its use or preservation (*Phenix Ins. Co. v. Hilliard*, 59 Fla. 590, 52 South. 799, 138 Am. St. Rep. 171).

Acceptance of fire insurance policy providing for forfeiture if insured's interest, "be other than unconditional and sole ownership," in fee simple, was equivalent to a declaration that these facts were true (*Terminal Ice & Power Co. v. American Fire Ins. Co.*, 196 Mo. App. 241, 194 S. W. 722).

1370-1371. (b) Sufficiency of disclosure in general

1370 (b). Where the policy on personal property described the property as purchased by another under a contract giving the plaintiff a lien thereon, there was a sufficient disclosure that plaintiff was

not the sole and unconditional owner (O'Neill v. Northern Assur. Co., 155 Mich. 564, 119 N. W. 911).

1371-1374. (c) What constitutes sole and unconditional ownership in general

1371 (c). The clause as to sole and unconditional ownership contemplates a beneficial and practical ownership (Bacot v. Phenix Ins. Co., 96 Miss. 223, 50 South. 729, 25 L. R. A. [N. S.] 1226, Ann. Cas. 1912B, 262). Such ownership is in those on whom the loss would certainly fall not as a matter of mere contract obligation, but as the result of real bona fide rights in the property. To be unconditional and sole, within the meaning of the phrase, the interest or ownership of the insured must be completely vested, not contingent or conditional, nor in common or jointly with others, but of such a nature that the insured would alone sustain the entire loss if the property be destroyed whether his title be legal or equitable (Phenix Ins. Co. v. Hilliard, 59 Fla. 590, 52 South. 799, 138 Am. St. Rep. 171). That is to say, insured's ownership is "sole" when no one other than insured has any interest in the property as owner, and is "unconditional" when the quality of the estate is not limited or affected by any condition.

Bacot v. Phenix Ins. Co., 96 Miss. 223, 50 South. 729, 25 L. R. A. (N. S.) 1226, Ann. Cas. 1912B, 262; Rochester German Ins. Co. v. Schmidt, 162 Fed. 447, 89 C. C. A. 333, reversing 151 Fed. 681.

1372 (c). Where a policy of fire insurance is issued in the name of the person who is the owner of the insured premises, but the policy is made payable to certain contractors "as their interest may appear," and on the very day the policy is issued the owner becomes a bankrupt, the policy is avoided both as to the owner and the contractors under the "sole ownership" clause, although it appears that the insurance was paid for by the contractors, that the insurance company knew this, and that neither the insurance company nor the contractors had any knowledge of the impending bankruptcy of the owner (New Kensington Lumber Co. v. German Ins. Co. of Freeport, 35 Pa. Super. Ct. 32). A contract between the plaintiff and a third person, from which it appeared that at the time it was entered into plaintiff was the owner and in possession of certain lands, that it was agreed that the land should remain in the plaintiff free from all liens and incumbrances, and that the title and possession of the sawmill thereon and the equipment necessary for carrying on the business of moving and delivering merchantable timber described

should remain in the plaintiff, did not establish a defense that the plaintiff was not at the time of the issuance of the policy the sole and unconditional owner of the property described (*National Fire Ins. Co. v. Three States Lumber Co.*, 119 Ill. App. 67, judgment affirmed 75 N. E. 450, 217 Ill. 115, 108 Am. St. Rep. 239). In *Chaney v. Farmers' Fire Ins. Co.*, 32 Pa. Super. Ct. 479, it appeared that the policy was issued in the name of "Mrs. H. M. Chaney & Daughter." The business was conducted under the name of "Mrs. H. M. Chaney & Daughter" who were apparently the owners of the business. Mrs. Chaney applied for the policy and received it from the agent. As a matter of fact the stock and business were owned by H. M. Chaney, the husband and father of the insured. It was held that the condition of the policy as to unconditional ownership precluded a recovery upon it.

1373 (c). Where insured was sole owner of the building covered by the policy, but had only a half interest in the lot on which it stood, he was a sole owner within the condition (*Nance v. Oklahoma Fire Ins. Co.*, 31 Okl. 208, 120 Pac. 948, 38 L. R. A. [N. S.] 426). So, too, one who owns the building is a sole and unconditional owner, though it is situated on government homestead, title to which is still in the United States, final proof not being made until after the loss (*Allen v. Phoenix Ins. Co.*, 12 Idaho, 653, 88 Pac. 245, 8 L. R. A. [N. S.] 903, 10 Ann. Cas. 328).

Where insured was individually the owner of the property, subject only to her right and duty as executrix to hold temporary possession for the purpose of administration of her deceased husband's estate, she was a sole and unconditional owner. *Raulet v. Northwestern Nat. Ins. Co. of Milwaukee*, 157 Cal. 213, 107 Pac. 292.

But owner of property who purchased as executor vested with title the estate with widow of testator, could not recover on a fire insurance policy not providing, as required by L. O. L. § 4066, amended by Laws Or. 1911, p. 279, for the insurance of any interest less than sole unconditional ownership. *Howard v. Horticultural Fire Relief of Oregon*, 77 Or. 349, 150 Pac. 270, rehearing denied 77 Or. 349, 151 Pac. 476; *Same v. German American Ins. Co. of New York*, 77 Or. 360, 151 Pac. 477.

The holder of the naked legal title to property, without any beneficial interest therein, has not the unconditional and sole ownership. *Des Moines Ins. Co. of Des Moines, Iowa, v. Moon*, 126 Pac. 753, 33 Okl. 437; *Cosmopolitan Fire Ins. Co. of New York v. Same*, 126 Pac. 756, 33 Okl. 445. An insured, who holds the property in trust for his children, is not a sole and unconditional owner. *Fox v. Queen Ins. Co.*, 124 Ga. 948, 53 S. E. 271.

1374-1375. (d) Defective and defeasible titles and fraudulent conveyances

1374 (d). Insured under a fire policy was the substantial owner within a provision exempting liability if his interest was other than unconditional and sole ownership, where he was in undisputed possession, claiming to be the sole owner under a warranty deed, though the deed recited an outstanding interest in a minor heir, conveyance to insured of which grantors covenanted to obtain on her reaching her majority (*Atlas Fire & Tornado Ins. Co. v. Malone*, 99 Ark. 428, 138 S. W. 962, Ann. Cas. 1913B, 210).

1375 (d). A conveyance in fraud of creditors vests the grantee with sole and unconditional ownership (*Grace v. Phoenix Ins. Co.*, 94 Miss. 201, 48 South. 298, 22 L. R. A. [N. S.] 732). But where a fire policy provided that it should be void if the interest of the insured should be other than unconditional and sole owner, the fact that the insured had previously conveyed the property in trust for himself to defraud creditors, and that it had afterwards been reconveyed to him by the trustee, did not affect his title, so as to prevent him from recovering on the policy (*Insurance Co. of Tennessee v. Waller*, 95 S. W. 811, 116 Tenn. 1, 115 Am. St. Rep. 763, 7 Ann. Cas. 1078).

1375. (e) Title of lessor or lessee

1375 (e). A lessee of property is not the unconditional and sole owner thereof, within a fire policy providing that the same shall be void if the interest of the insured is other than unconditional and sole ownership.

Downs v. German Alliance Ins. Co., 6 Pennewill (Del.) 166, 67 Atl. 146;
Seltz v. Scottish Union & National Ins. Co., 37 Pa. Super. Ct. 261;
Schlavoni v. Dubuque Fire & Marine Ins. Co., 48 Pa. Super. Ct. 252.

1375-1376. (f) Vendor under contract of sale

1375 (f). Under an insurance policy requiring "unconditional and sole ownership" there can be no recovery by insured, if at the time there was a valid contract outstanding for the sale of the premises.

Merchants' Ins. Co. v. Brown, 35 Ohio Cir. Ct. R. 69; *Gorsch v. Niagara Fire Ins. Co. of New York*, 123 N. Y. Supp. 877, 68 Misc. Rep. 344;
Insurance Co. of North America v. Erickson, 39 South. 495, 50 Fla. 419, 2 L. R. A. (N. S.) 512, 111 Am. St. Rep. 121, 7 Ann. Cas. 495;
French v. Delaware Ins. Co., 180 S. W. 85, 167 Ky. 176; *Sharman v. Continental Ins. Co. of City of New York*, 167 Cal. 117, 138 Pac. 708, 52 L. R. A. (N. S.) 670.

1375-1376 AVOIDANCE OF CONTRACT—INSURANCE OF PROPERTY

1376 (f). In *Brunswick-Balke-Collender Co. v. Northern Assur. Co.*, 142 Mich. 29, 105 N. W. 76, it appeared that the policy, which provided that it should be void if the interest of the insured was other than unconditional and sole ownership, described the property as the property of the insured. He held the legal title thereto, subject to the rights of a buyer to acquire title by performance of a contract of sale. There were no representations made by insured in procuring the policy, and the application therefor was verbal. It was held that the policy was valid, as the insurer could not complain of its failure to require a more specific description.

1376-1378. (g) Equitable title—Vendee under contract of purchase

1376 (g). An equitable owner is an entire and sole owner with in a policy stipulating that insured was the sole and unconditional owner of the property.

Arkansas Ins. Co. v. McManus, 86 Ark. 115, 110 S. W. 797; *McCullough v. Home Ins. Co. of New York*, 102 Pac. 814, 155 Cal. 659; *Connecticut Fire Ins. Co. v. Colorado Leasing, Min. & Mill. Co.*, 50 Colo. 424, 116 Pac. 154, Ann. Cas. 1912C, 597; *Modlin v. Atlantic Fire Ins. Co.*, 151 N. C. 35, 65 S. E. 605; *Exchange Underwriters' Agency of Royal Exchange Assur. of London, England, v. Bates*, 195 Ala. 161, 69 South. 956; *Hankins v. Williamsburg City Fire Ins. Co.*, 153 Pac. 491, 96 Kan. 706; *Brown v. Connecticut Fire Ins. Co., of Hartford, Conn.*, 197 Mo. App. 317, 195 S. W. 62; *Same v. Providence-Washington Ins. Co. (Mo. App.)* 195 S. W. 65; *Livingstone v. Boston Ins. Co.*, 99 Atl. 212, 255 Pa. 1; *Turner v. Home Ins. Co.*, 195 Mo. App. 138, 189 S. W. 626.

Accordingly a vendee in possession under a valid contract of purchase and entitled to specific performance is a sole and unconditional owner.

Arkansas Ins. Co. v. McManus, 86 Ark. 115, 110 S. W. 797; *McCullough v. Home Ins. Co.*, 155 Cal. 659, 102 Pac. 814, 18 Ann. Cas. 862; *Connecticut Fire Ins. Co. v. Colorado Leasing, Min. & Mill. Co.*, 50 Colo. 424, 116 Pac. 154, Ann. Cas. 1912C, 597; *Insurance Co. of North America v. Erickson*, 39 South. 495, 50 Fla. 419, 2 L. R. A. (N. S.) 512, 111 Am. St. Rep. 121, 7 Ann. Cas. 495; *Phenix Ins. Co. v. Hilliard*, 59 Fla. 590, 52 South. 799, 138 Am. St. Rep. 171; *President, etc., of Ins. Co. of North America v. Pitts*, 88 Miss. 587, 41 South. 5, 7 L. R. A. (N. S.) 627, 117 Am. St. Rep. 756, 9 Ann. Cas. 54; *Jordan v. Hanover Fire Ins. Co.*, 151 N. C. 341, 66 S. E. 206; *Arkansas Ins. Co. v. Cox*, 21 Okl. 873, 98 Pac. 552, 20 L. R. A. (N. S.) 775, 129 Am. St. Rep. 808; *Wright v. Hartford Fire Ins. Co.*, 54 Tex. Civ. App. 6, 118 S. W. 191; *Waller v. City of New York Ins. Co.*, 84 Or. 284, 164 Pac. 959.

The rule applies, though a portion of the purchase money is still unpaid.

Connecticut Fire Ins. Co. v. Colorado Leasing, Min. & Mill. Co., 50 Colo. 424, 116 Pac. 154, Ann. Cas. 1912C, 597; President, etc., Ins. Co. of North America v. Pitts, 88 Miss. 587, 41 South. 5, 7 L. R. A. (N. S.) 627, 117 Am. St. Rep. 756, 9 Ann. Cas. 54; Jordan v. Hanover Fire Ins. Co., 66 S. E. 206, 151 N. C. 341; Arkansas Ins. Co. v. Cox, 21 Okl. 873, 98 Pac. 552, 20 L. R. A. (N. S.) 775, 129 Am. St. Rep. 808; Wright v. Hartford Fire Ins. Co., 54 Tex. Civ. App. 6, 118 S. W. 191.

However, in *Cole v. Niagara Fire Ins. Co.*, 126 Mo. App. 134, 103 S. W. 569, it was held that one contracting to purchase property, and as part of the consideration assuming to pay notes owing by the vendor and secured by a deed of trust on the property, is not before payment of the notes or the balance of the price the sole and unconditional owner of the property within the meaning of a fire insurance policy, providing that the policy shall be void if the interest of the insured be other than an unconditional and sole ownership. And in *Liverpool & London & Globe Ins. Co. v. Hughes*, 89 S. E. 817, 145 Ga. 716, it was held that, where a fire policy provided that it should be void if interest of insured was other than unconditional and sole ownership, or if the subject-matter of insurance should be a building on ground not owned by insured in fee simple, the fact that insured had a bond for title when the insurance was effected on the building, would not answer requirements of condition.

1377 (g). A vendee under a parol contract to purchase real estate, which cannot be enforced under the statute of frauds, has no insurable interest in the property as an unconditional and sole owner, within the meaning of such words, in a policy of fire insurance (*Prospect Dye Works v. Federal Ins. Co.*, 33 Pa. Super. Ct. 223).

1378-1380. (h) Property subject to lien—Interest of mortgagor and mortgagee

1378 (h). The rule generally adopted is that the condition as to sole and unconditional ownership is not violated by the existence of liens and incumbrances on the property.

Lancaster v. Southern Ins. Co., 153 N. C. 285, 69 S. E. 214, 138 Am. St. Rep. 665; *Connecticut Fire Ins. Co. v. Manning*, 160 Fed. 382, 87 C. C. A. 334, 15 Ann. Cas. 338; *Lloyd v. North British & Mercantile Ins. Co. of London & Edinburgh*, 161 N. Y. Supp. 271, 174 App. Div. 371.

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Hence it has been held that the clause is not violated by the existence of a vendor's lien.

Planters' Mut. Ins. Co. v. Hamilton, 90 S. W. 233, 77 Ark. 27, 7 Ann. Cas. 55; *President, etc., of Ins. Co. of North America v. Pitts*, 41 South. 5, 88 Miss. 587, 7 L. R. A. (N. S.) 627, 117 Am. St. Rep. 756, 9 Ann. Cas. 54; *Wright v. Hartford Fire Ins. Co.*, 54 Tex. Civ. App. 6, 118 S. W. 191; *Pauley v. Sun Ins. Office (W. Va.)* 90 S. E. 552.

The issuance of a tax certificate, creating at most a lien for taxes, does not render the owner of the property less than a sole and unconditional owner (*Connecticut Fire Ins. Co. v. Colorado Leasing Min. & Mill. Co.*, 50 Colo. 424, 116 Pac. 154, Ann. Cas. 1912C, 597).

In *Perrin v. Stuyvesant Ins. Co.*, 140 La. 812, 74 South. 110, however, under fire policy conditioned to be void if interest of insured was other than unconditional and sole ownership, it was held that insured could not recover for a loss if at the time of issuing the policy and for some time thereafter the title stood in the state under tax sale though subject to redemption.

1379 (h). The existence of a mortgage for part of the purchase price of insured property does not constitute a breach of the provision contained in the policy that the same shall be void if the interest to be insured is other than unconditional and sole ownership.

Merchants' Mut. Fire Ins. Co. v. Harris, 51 Colo. 95, 116 Pac. 143; *Standard Leather Co. v. Mercantile Town Mut. Ins. Co.*, 131 Mo. App. 701, 111 S. W. 631; *Terminal Ice & Power Co. v. American Fire Ins. Co.*, 196 Mo. App. 241, 194 S. W. 722; *Fire Ass'n of Philadelphia v. Evansville Brewing Ass'n (Fla.)* 75 South. 196.

The existence of a trust deed on the property insured is only an incumbrance, and does not constitute a breach of warranty of sole and unconditional ownership (*Teter v. Franklin Fire Ins. Co.*, 74 W. Va. 344, 82 S. E. 40).

1380-1381. (i) Partnership or corporate property

1380 (i). That the legal title to land is in the individual members of a partnership and the heirs of a deceased partner is not a violation of the provision in a policy, issued in the name of the firm, as to unconditional and sole ownership (*Scott v. Dixie Fire Ins. Co.*, 70 W. Va. 533, 74 S. E. 659, 40 L. R. A. [N. S.] 152). So, too, where a policy of fire insurance on a stock of merchandise is is-

sued to a person as sole and unconditional owner, and it appeared that at the time the policy was issued, and at the date of a subsequent fire, another person conducted the business, receiving for his services one-half of the profits, without liability to share in the losses, the insured may recover on the policy, although the insured and the person who conducted the business held themselves out to the world as partners, and were, in fact, partners as far as creditors were concerned (*Swingle v. Sun Ins. Office*, 33 Pa. Super. Ct. 261).

1381-1382. (j) Property of husband and wife

1382 (j). A husband cannot insure the homestead, title to which is in the wife, representing that he is the sole and unconditional owner, and, when the risk is destroyed, abandon the insurance contract and its condition as to sole ownership, and collect the value of the policy on the theory that he, though not the sole owner, as represented, yet has an insurable interest in the property as a homestead (*Bacot v. Phenix Ins. Co.*, 96 Miss. 223, 50 South. 729, 25 L. R. A. [N. S.] 1226, Ann. Cas. 1912B, 262). In *Rochester German Ins. Co. v. Schmidt*, 162 Fed. 447, 89 C. C. A. 333, reversing (C. C.) 151 Fed. 681, the facts were these: The title to the land on which the insured property was situated long prior to the issuance of the policies had been transferred to insured's wife, and she dying intestate, title descended one-third to insured and two-thirds to his daughters. Without objection from the daughters, insured had always treated the property as his own, having bought and paid for it originally. He paid taxes, built and controlled houses thereon, and collected rents, and at his own cost had placed on the property the building and machinery destroyed. He made no written application for the insurance and no representation with regard to the title of the land. It was held that the policies were void for want of unconditional and sole ownership in insured, though the condition of the title did not increase the risk.

A bargain and sale deed from a wife to her husband without the approval of the superior court does not pass such a title as is required by a fire policy providing that it shall be void if insured has not an unconditional fee-simple title (*American Ins. Co. v. Bagley*, 65 S. E. 787, 6 Ga. App. 736). In *Groce v. Phoenix Ins. Co.*, 94 Miss. 201, 48 South. 298, 22 L. R. A. (N. S.) 732, it was held that the term "third person" as used in the Mississippi statute (Laws 1900, p. 130, c. 90), providing that a conveyance of land, etc., between

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husband and wife shall not be valid as against any third person, unless the conveyance be acknowledged and filed for record, includes only any person in a position to be prejudiced by the secret conveyance; and hence, where a wife conveyed property to her husband by an unrecorded deed valid as to her, and her husband insured it, the deed was not void as to the insurance company, since, as nobody but insured or his wife could be the real owner, and the wife had parted with her interest to insured, the company could not have been prejudiced.

Insurance policy, conditioned on sole and unconditional ownership, was not avoided by the fact that assured was tenant by the entirety with his wife, where he had paid for the property with his own money, directing the deed to be made to himself and, being illiterate, supposed it to have been so made until after the fire (*Turner v. Home Ins. Co.*, 195 Mo. App. 138, 189 S. W. 626).

Where wife took out insurance, describing herself as unconditional and sole owner, insurer is not relieved of liability because legal title is in the name of husband and wife, where he has left jurisdiction and abandoned property and she purchased property with her own money (*Livingstone v. Boston Ins. Co.*, 99 Atl. 212, 255 Pa. 1).

Notwithstanding provision invalidating policy if interest of insured was other than sole ownership, ownership jointly with other members of family, or husband's interest in household furniture, etc., has been held not to invalidate the policy (*North River Ins. Co. v. Dyche*, 163 Ky. 271, 173 S. W. 784).

1382-1383. (k) Personal property—Conditional sales—Chattel mortgages

1382 (k). A vendor of merchandise, though retaining title till the price is paid, is not the unconditional and sole owner, within a provision of a fire policy (*Phoenix Ins. Co. of Brooklyn, N. Y., v. Quinette*, 36 Okl. 384, 128 Pac. 722). So, where prior to the effecting of insurance on a tug and at the time of the loss plaintiff had sold the tug under contract at least partly executed, and the purchaser was in possession, plaintiff had not unconditional and sole ownership as required by the policy (*Point Gratiot Sand & Gravel Co. v. Hartford Fire Ins. Co.*, 136 N. Y. Supp. 877, 77 Misc. Rep. 221).

In *Petello v. Teutonia Fire Ins. Co.*, 89 Conn. 175, 93 Atl. 137, however, bill of sale given by insured was held not to violate the

condition of a policy that his interest was that of sole and unconditional ownership. And it has been stated that neither option nor invalid or conditional contract of sale of personalty with reservation of title, though possession is transferred, is breach of condition of policy requiring sole and unconditional ownership (*Houseman v. Home Ins. Co.*, 78 W. Va. 203, 88 S. E. 1048, L. R. A. 1917A, 299).

Though it seems to be the general rule that one who buys personal property on condition that the title shall remain in the seller until the purchase price is paid is not a sole and unconditional owner, it has been held in *Lancaster v. Southern Ins. Co.*, 153 N. C. 285, 69 S. E. 214, 138 Am. St. Rep. 665, that where the purchaser of machinery took possession and gave purchase money notes reserving title in the seller, which notes were recorded, and all of the purchase money had not been paid, the purchaser was nevertheless the sole and unconditional owner. And in *Johnson v. Farmers' Ins. Co.*, 126 Iowa, 565, 102 N. W. 502, it was said that the existence of a contract under which plaintiff purchased a part of the goods destroyed by fire, wherein he agreed that the title to the goods should remain in the seller until they were fully paid for, does not of itself negative an absolute sale to plaintiff of the goods purchased by him under the agreement, or show a breach of his warranty of sole ownership of such goods.

Where the insured obtained possession of the goods from their owner under an agreement to replace them, if he sold them, or pay the owner for them at a time specified, and obtained insurance thereon and the previous owner had no control over the goods and no right to repossess himself of them insured had "an unconditioned sole ownership" (*Bush v. Hartford Fire Ins. Co.*, 71 Atl. 916, 222 Pa. 419).

A policy of fire insurance covered household goods, furniture, wearing apparel, pianoforte, and "all articles usually used in housekeeping belonging to the assured or any member of his family." A fire occurred, and among other things destroyed was a piano. The assured included the piano in the sworn proof of loss. At the trial he withdrew this claim and testified that he had included the piano under a misapprehension, thinking that the title to it was in himself, but that he had been advised by counsel that he only held a lease of the piano. It was held that the piano was never insured at all under the policy, and that the stipulation as to sole ownership did not apply. *Swift v. Teutonia Ins. Co.*, 28 Pa. Super. Ct. 253.

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1383 (k). In New Mexico (*Shoucair v. North British & Mercantile Ins. Co.*, 16 N. M. 563, 120 Pac. 328), it has been held that the existence of a recorded chattel mortgage on the property is inconsistent with sole and unconditional ownership.

17. PLEADING AND PRACTICE WITH REFERENCE TO MISREPRESENTATION, CONCEALMENT, AND BREACH OF WARRANTY OR CONDITION AS TO TITLE OR INTEREST

1384-1385. (a) Complaint, petition or declaration

1384 (a). The insured must, of course, allege ownership. In *Norwich Union Fire Ins. Soc. v. Prude*, 156 Ala. 565, 46 South. 974, the declaration alleged that the policy was payable to the estate of P., but that plaintiffs are the parties really interested and are the beneficial owners of the policy, and the legal and equitable title thereof was in them alone at the time it was issued and at the time of the loss, to which defendant demurred on the ground that the allegations were mere conclusions of the pleader unsupported by averments of facts; that they did not show that the premises were ever the property of P., or whether there was an estate of P., and plaintiff's relation thereto, or whether P., if dead, died intestate or testate; that there might be an outstanding estate in the insured premises in the surviving husband, and it did not appear that either of plaintiffs was such husband, and it did not appear from the allegations that the action did not accrue in the lifetime of decedent, and was not the personal property of the decedent at the time of her death, and hence was only collectible by her administrator. It was held that the declaration was not demurrable on the grounds stated.

The insured need not, however, anticipate the defense that he did not have the title or interest required by the terms of the policy (*Scottish Nat. Ins. Co. v. Adams*, 122 Ill. App. 471).

1385-1386. (b) Plea, answer, or affidavit of defense

1385 (b). Misrepresentation, and breach of warranty or condition as to title or interest, must be pleaded specially to be available.

Loyal Mut. Fire Ins. Co. v. J. S. Brown & Bro. Mercantile Co., 47 Colo. 467, 107 Pac. 1098; *Connecticut Fire Ins. Co. v. Colorado Leasing, Min. & Mill. Co.*, 50 Colo. 424, 116 Pac. 154, Ann. Cas. 1912C, 597; *Scottish Nat. Ins. Co. v. Adams*, 122 Ill. App. 471; *Maginnis v.*

Hartford Fire Ins. Co., 160 Ill. App. 614. But see Rochester German Ins. Co. v. Monumental Sav. Ass'n, 107 Va. 701, 60 S. E. 93.

Allegations of the answer that the policy was to be void if insured's interest in the property was not truly stated, and that insured falsely represented that he owned the premises on which the property was located, did not raise the defense that the policy was void because the insured property was not on ground owned by insured in fee, where neither the answer nor the policy stated what insured's interest was in the ground on which the building was located; a provision of the policy avoiding it if the building is on ground not owned by insured in fee not being such a statement (Loyal Mut. Fire Ins. Co. v. J. S. Brown & Bro. Mercantile Co., 107 Pac. 1098, 47 Colo. 467).

The sufficiency of the plea is considered in Norwich Union Fire Ins. Soc. v. Prude, 156 Ala. 565, 46 South. 974.

1386-1387. (d) Issues and proof

1386 (d). A general averment in the complaint that plaintiff, at the inception of the policy and at the time of the loss, was the owner of the property destroyed, is sufficient to admit evidence of any interest he may have had (New Hampshire Fire Ins. Co. v. Wall, 75 N. E. 668, 36 Ind. App. 238).

In Rochester German Ins. Co. v. Monumental Sav. Ass'n, 107 Va. 701, 60 S. E. 93, it was held that breach of the condition as to sale and unconditional ownership need not be specially pleaded but that evidence thereof could be introduced under the general issue.

1387. (e) Evidence—Presumptions—Burden of proof

1387 (e). In Thermal Belt Sanatorium Co. v. Hartford Ins. Co., 157 N. C. 551, 73 S. E. 337, it was said that title in insured to the insured property is presumed prima facie from his possession and control thereof and the issuance of a policy to insured on certain property is presumptive evidence of title in him.

The insurer has the burden of proving matters in avoidance based on misrepresentation, or breach of warranty or condition as to title or interest.

Atlas Fire & Tornado Ins. Co. v. Malone, 99 Ark. 428, 138 S. W. 962, Ann. Cas. 1913B, 210; Gate City Fire Ins. Co. v. Thornton, 63 S. E. 638, 5 Ga. App. 585; American Ins. Co. v. I. F. Peebles & Co., 64 S. E. 304, 5 Ga. App. 731; Rochester German Ins. Co. v. Monumental Sav. Ass'n, 107 Va. 701, 60 S. E. 93; Milhim v. Hawk-

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eye Ins. Co., 171 Ill. App. 262. But the contrary rule prevails in Connecticut according to *Benanti v. Delaware Ins. Co.*, 86 Conn. 15, 84 Atl. 109, Ann. Cas. 1913D, 826.

1387-1388. (f) Same—Admissibility

1387 (f). Where insurer denied insured's ownership of a boat covered by the policy a bill of sale of the boat was admissible to show title in the insured (*Higson v. North River Ins. Co.*, 152 N. C. 206, 67 S. E. 509). Where the issue was whether the personal property insured had been conditionally sold it was competent to ask the vendee: "When was the title to vest? When were you to get title? When were you to own it?" where such questions were concerning the agreement, rather than asking for a conclusion as to the effect thereof (*Brunswick-Balke-Collender Co. v. Northern Assur. Co.*, 113 N. W. 1113, 150 Mich. 311).

Where a stock of insured goods had been almost entirely purchased from the W. B. Company, and defendant, in an action on the policy, averred that the goods still belonged to that company and that plaintiffs were not the sole and unconditional owners thereof, statements made by the W. B. Company to a bank showing the aggregate amount of its accounts receivable at a time subsequent to the sale of the goods to plaintiffs were inadmissible on the issue of ownership in the absence of other testimony contradicting plaintiffs' direct testimony that they were the owners of the goods, etc. (*Clute v. Clintonville Mut. Fire Ins. Co.*, 129 N. W. 661, 144 Wis. 638, 32 L. R. A. [N. S.] 240).

Where a deed is offered in evidence to show a breach of the condition as to sole and unconditional ownership, it is competent for insured to show that he was the equitable owner by showing that the third person held the legal title in trust for him (*Modlin v. Atlantic Fire Ins. Co.*, 151 N. C. 35, 65 S. E. 605). And where the insurer denied liability for breach of an alleged representation as to ownership, in that there was an undisclosed deed of trust on the property in addition to a mortgage, which was disclosed, evidence that the insured property was included in the deed of trust by mistake, that neither of the parties intended to include it, and that neither of them knew it was included until after suit on the policy, was admissible (*Miller v. Phenix Ins. Co.*, 100 Miss. 311, 56 South. 449).

1388-1389. (g) Same—Weight and sufficiency

1388 (g). In an action on a fire policy stipulating that insured was the sole and unconditional owner of the property, evidence to establish the equitable ownership of the property in insured and that a third person held the legal title in trust was not within the rule requiring clear, strong, and convincing proof (*Modlin v. Atlantic Fire Ins. Co.*, 151 N. C. 35, 65 S. E. 605).

The sufficiency of the evidence on the issue as to insured's title to the property covered by the policy is considered in *Ozark Ins. Co. v. Hopson*, 82 Ark. 603, 101 S. W. 171; *American Ins. Co. v. Dannehower*, 115 S. W. 950, 89 Ark. 111; *Connecticut Fire Ins. Co. v. Colorado Leasing, Min. & Mill. Co.*, 50 Colo. 424, 116 Pac. 154, Ann. Cas. 1912C, 597; *Gardner v. Continental Ins. Co.*, 101 S. W. 908, 125 Ky. 464, 31 Ky. Law Rep. 89; *Hillburn v. Phenix Ins. Co.*, 129 Mo. App. 670, 108 S. W. 576; *Stotlar v. German Alliance Ins. Co.*, 23 N. D. 346, 136 N. W. 792; *Same v. Citizens' Ins. Co. of Mo.*, 23 N. D. 352, 136 N. W. 794; *Home Ins. Co. of New York v. Coker*, 43 Okl. 331, 142 Pac. 1195, Ann. Cas. 1917C, 950; *Bleznak v. Springfield Fire & Marine Ins. Co.*, 237 Fed. 589, 150 C. C. A. 471; *Milwaukee Steel Type & Die Co. v. American Cent. Ins. Co.*, 159 N. W. 938, 164 Wis. 298.

1389-1390. (i) Instructions

1389 (i). An instruction that, where a policy provides that it shall be void if insured is not the sole and unconditional owner of the property, such sole ownership in assured is a condition precedent to a right of recovery, was properly modified by adding a clause that such was the law, unless the jury believed by a preponderance of the evidence that the condition was waived (*Hartford Fire Ins. Co. v. Enoch*, 96 S. W. 393, 79 Ark. 475).

18. EFFECT OF CONCEALMENT, MISREPRESENTATION, OR BREACH OF WARRANTY OR CONDITION AS TO EXISTING INCUMBRANCES ON THE PROPERTY INSURED**1394. (b) Conditions in policy**

1394 (b). A condition in a policy that it shall be void if the property is incumbered without indorsement thereon is binding (*National Fire Ins. Co. of Hartford, Conn. v. Kneidel*, 30 Ohio Cir. Ct. R. 677; *Riley v. Aetna Ins. Co.* [W. Va.] 92 S. E. 417); and insured, by accepting a policy on incumbered property containing such a condition, was charged with notice of and bound by such condition (*Virginia Fire & Marine Ins. Co. v. J. I. Case Threshing Mach. Co.*, 107 Va. 588, 59 S. E. 369, 122 Am. St. Rep. 875).

However, a bill of sale has been held not within the condition of an insurance policy avoiding it should the property be incumbered by a chattel mortgage (*Petello v. Teutonia Fire Ins. Co.*, 89 Conn. 175, 93 Atl. 137, L. R. A. 1915D, 812), and that the insured lumber was subject to a mortgage authorizing the mortgagee to sell and replace same with new, which it was doing, has been held not to invalidate the insurance, though the policy provided that it should be void if the subject of the insurance "be or become incumbered by a chattel mortgage" (*Ensel v. Lumber Ins. Co. of New York*, 88 Ohio St. 269, 102 N. E. 955).

1394-1395. (c) Necessity of disclosure of incumbrances

1394 (c). It is of course fundamental that a fire policy is avoided by insured's failure to disclose a mortgage in his application, when asked whether any existed (*T. S. Hollenbeck & Co. v. Mercantile Town Mut. Fire Ins. Co.*, 113 S. W. 217, 133 Mo. App. 57). But there is abundant authority for the statement that where no inquiries are made regarding incumbrances and no representations are made in respect thereof, and there is no intentional concealment the existence of an incumbrance will not avoid the policy.

Humble v. German Alliance Ins. Co., 85 Kan. 140, 116 Pac. 472, Ann. Cas. 1912D, 630; *Kennedy v. London & Lancashire Fire Ins. Co.*, 157 Mich. 411, 122 N. W. 134; *Neher v. Western Assur. Co.*, 82 Pac. 166, 40 Wash. 157. But see *Mecca Fire Ins. Co. of Waco v. Moore* (Tex. Civ. App.) 128 S. W. 441; *Niagara Fire Ins. Co. v. Layne*, 185 S. W. 1136, 170 Ky. 339; *Niagara Fire Ins. Co. v. Layne*, 172 S. W. 1090, 162 Ky. 665; *Humble v. German Alliance Ins. Co.*, 141 Pac. 243, 92 Kan. 486, affirming judgment on rehearing 137 Pac. 980, 91 Kan. 307.

So, where insured left the matter of keeping insurance on his property to an insurance agent, who at all times kept it insured, at first in one company, and later, not being an agent for that company, of his own motion, without any application being signed by insured, transferred the insurance to another company which he represented, and which accepted the insurance, the company takes the risk of undisclosed taxes on the property when it issued the policy (*Kennedy v. London & Lancashire Fire Ins. Co.*, 122 N. W. 134, 157 Mich. 411).

1399-1404. (e) Effect of false statements, concealment, or breach of condition

1399 (e). A warranty in a fire policy against incumbrances existing at the time on the property insured is valid, and its violation

renders the policy void (*Hartford Fire Ins. Co. v. Wright*, 58 Tex. Civ. App. 237, 125 S. W. 363).

1402 (e). Where a policy insuring personal property against loss by fire provides that it shall be void if the property be or become incumbered by chattel mortgage, the existence of a mortgage on the property unknown to the insurer defeats the policy.

Meech v. Citizens' Ins. Co. of Missouri, 147 Mich. 343, 110 N. W. 1078; *Fries, Breslin Co. v. Star Fire Ins. Co. (C. C.)* 150 Fed. 611, affirmed in 154 Fed. 35, 83 C. C. A. 147. But compare *Humble v. German Alliance Ins. Co.*, 85 Kan. 140, 116 Pac. 472, Ann. Cas. 1912D, 630; *Roper v. National Fire Ins. Co. of Hartford*, 76 S. E. 869, 161 N. C. 151; *Ollker v. Williamsburgh City Fire Ins. Co.*, 78 S. E. 746, 76 W. Va. 436, Ann. Cas. 1915D, 914.

So, too, under a stipulation that, if the interest of insured be other than unconditional and sole ownership, the policy shall be void, the existence of a recorded chattel mortgage on the property at the time of the issuance of the policy invalidates it (*Shoucair v. North British & Mercantile Ins. Co. of London, England*, 16 N. M. 563, 120 Pac. 328).

Where a policy insuring incumbered property was void from its inception, because of the incumbrance, the insurer was not required to return or offer to return premiums voluntarily paid before notice of the invalidity of the policy as a condition precedent to its right to avail itself of such defense in an action on the policy (*Virginia Fire & Marine Ins. Co. v. J. I. Case Threshing Mach. Co.*, 107 Va. 588, 59 S. E. 369, 122 Am. St. Rep. 875).

1404-1409. (f) Same—As dependent on materiality

1404 (f). Warranties and conditions respecting the existence of incumbrances on the insured property and the amount thereof are generally regarded as material to risk as a matter of law.

Madsen v. Farmers & Merchants Ins. Co., 87 Neb. 107, 126 N. W. 1086, 29 L. R. A. (N. S.) 97, Ann. Cas. 1912A, 985; *Connecticut Fire Ins. Co. v. Manning*, 160 Fed. 382, 87 C. C. A. 334, 15 Ann. Cas. 338.

1409-1410. (g) Same—As dependent on knowledge and intent

1410 (g). To relieve a fire insurance company from liability because of incumbrances on the insured property which were concealed, it must appear that insured knew, or the circumstances were such that an ordinarily prudent person would know, that the existence of mortgages on the property was material to the risk (*Continental Ins. Co. v. Ford*, 131 S. W. 189, 140 Ky. 406). So the fact

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that the application for a fire policy falsely stated that the property was not incumbered was no defense to an action on the policy, where the insured did not know that the application contained such question and answer (*Warner v. Narragansett Mut. Fire Ins. Co.*, 90 Atl. 706, 111 Me. 590).

1410-1411. (h) Same—Statutory provisions limiting effect of false statements

1410 (h). The Texas statute (Rev. St. 1895, art. 3096aa, Gen. Laws 1903, p. 94) provides that any provision in any contract or policy of insurance that the answers or statements made in the application or in the contract, if false, shall render the contract or policy void or voidable, shall be of no effect, and shall not be a defense to a suit on the contract, unless it be shown on the trial thereof that the matter represented was material to the risk, etc. It was held in *Hartford Fire Ins. Co. v. Wright*, 58 Tex. Civ. App. 237, 125 S. W. 363, that the act applies only where there are misrepresentations by insured, either in the application or in the policy itself, and does not apply to a provision in the policy making it void if the property be or become incumbered by a chattel mortgage; there being no representation made by insured. But, on the other hand, it was held in *Mecca Fire Ins. Co. of Waco v. Stricker* (Tex. Civ. App.) 136 S. W. 599, that a stipulation in the policy relating to liens on the property was a representation within the meaning of the statute so that a misrepresentation with reference thereto could not be set up as a defense without showing that it was material.

Under Civ. Code S. C. 1912, § 2719, provided that insurer shall be estopped to deny truth of statement in applications for policy after 60 days, where a fire policy, providing that it should be void if personal property insured be or become incumbered by a chattel mortgage, was issued on personal property incumbered by chattel mortgage, policy was valid (*Camden Wholesale Grocery v. National Fire Ins. Co. of Hartford, Conn.*, 91 S. E. 732, 106 S. C. 467).

1412-1413. (j) Questions of practice—Evidence

1413 (j). The sufficiency of the evidence to sustain a finding that insured did not fraudulently conceal the existence of mortgages on the property is considered in *Continental Ins. Co. v. Ford*, 140 Ky. 406, 131 S. W. 189.

1413-1414. (k) Same—Trial and review

1414 (k). Where the answer, besides other defenses, set up that the contract of insured was violated at the time of application and statements to obtain insurance, by stating that there was no incumbrance on the property, whereas in fact there was a chattel mortgage thereon, amounting to a defense of conscious failure of duty on insured's part, a charge on the effect of fraud by insured, in concealing from the insurance company material facts or misleading them, was properly given (*Hankinson v. Piedmont Mut. Ins. Co.*, 61 S. E. 905, 80 S. C. 392).

19. CONSTRUCTION OF STATEMENTS AND SUFFICIENCY OF DISCLOSURE AS TO EXISTENCE AND AMOUNT OF INCUMBRANCES**1418-1419. (b) What constitutes an incumbrance**

1418 (b). In determining whether the property is incumbered within the condition, the court should look at the circumstances surrounding the execution of the instrument sought to be considered an incumbrance, at the situation of the parties, and at what was done under it, to determine its true character, and the question cannot be wholly determined by the form of the instrument or by the name that is given to it (*Raulet v. Northwestern Nat. Ins. Co. of Milwaukee*, 157 Cal. 213, 107 Pac. 292).

1419-1423. (c) Same—Mortgages

1420 (c). An instrument in the form of a bond to become effective on the nonpayment of rent, and creating a lien on personal property for such suit, is not a "chattel mortgage," within the condition (*Raulet v. Northwestern Nat. Ins. Co. of Milwaukee*, 157 Cal. 213, 107 Pac. 292).

An unrecorded mortgage is an incumbrance within the condition (*Rhea v. Planters' Mut. Ins. Ass'n*, 77 Ark. 57, 90 S. W. 850); and so, too, is an unfiled chattel mortgage (*Madsen v. Farmers' & Merchants' Ins. Co.*, 87 Neb. 107, 126 N. W. 1086, 29 L. R. A. [N. S.] 97, Ann. Cas. 1912A, 985). But policies on property in the warehouse of a corporation, whether held by it as owner or bailee, are not avoided by a chattel mortgage given by one of the depositors, although policies provided that they should be void if the property was incumbered (*Kline Bros. & Co. v. Royal Ins. Co.* [C. C.] 192 Fed. 378).

1421 (c). A release of a mortgage, though without consideration, is good as against the insurer (*Home Fire Ins. Co. v. Driver*, 87 Ark. 171, 112 S. W. 200). But where one executed a chattel mortgage in March to secure an indorser of a note, and the note was surrendered and a new note given in September, and it was understood that the original note should be of no further force, but no agreement was made as to the mortgage, and the property was insured in October by a policy which provided that it should be void if the property were incumbered by chattel mortgage, and the mortgage was unknown to the insurer, the policy was void, the mortgage being prima facie security for the renewal note (*Meech v. Citizens' Ins. Co.*, 110 N. W. 1078, 147 Mich. 343).

1422 (c). In *Lancaster v. Southern Ins. Co.*, 153 N. C. 285, 69 S. E. 214, 138 Am. St. Rep. 665, it was held that where the seller takes purchase-money notes and delivers possession of an engine and boiler, retaining title as security, and the contract of sale is registered pursuant to statute, the property retains its character as personalty both as between the parties and others claiming adversely to the lien, though attached to the realty, and is personalty within the meaning of a fire policy thereon, which avoided the policy if the subject of insurance was personalty, and was, or thereafter became, incumbered by a chattel mortgage. So, too, a vessel is a chattel, so that a mortgage thereof a "chattel mortgage," within the meaning of a provision that "if the subject of insurance be personal property and be or become incumbered by a chattel mortgage," the policy is void (*Gilchrist Transp. Co. v. Phenix Ins. Co.*, 170 Fed. 279, 95 C. C. A. 475).

In *Perry v. London Assur. Corp.*, 167 Fed. 902, 93 C. C. A. 302, the facts were these: Policies of insurance on sawmill property, machinery, etc., contained the usual provision that they should be void if any misrepresentation was made as to the title or ownership of the property, if it should be incumbered by any mortgage, or if there should be any fraud or false swearing either before or after any loss. The insured represented the property to be free of incumbrance, and in proofs made after a loss swore that there had been no change in the title or possession of the property since the issuance of the policies. In fact there had been a decree foreclosing a chattel mortgage on the property, and an order of sale, under which the master had taken possession of the property, and the insured had taken an appeal from such decree, and had given a supersedeas bond, in which he stipulated that the property should

be held by him subject to the order of the appellate court, which subsequently affirmed the decree of foreclosure. It was held that the policies were avoided by a breach of their conditions.

1423-1424. (d) Same—Liens

1424 (d). A vendor's lien is an incumbrance within the condition (*Wright v. Hartford Fire Ins. Co.*, 54 Tex. Civ. App. 6, 118 S. W. 191).

20. EFFECT OF CONCEALMENT, MISREPRESENTATION, OR BREACH OF WARRANTY AS TO SPECIAL CIRCUMSTANCES AFFECTING THE RISK, AND PRECAUTIONS AGAINST LOSS.

1426-1429. (a) Special circumstances affecting the risk

1427 (a). Where insurer, before issuing a policy to a partnership, made inquiry as to the persons constituting it, it was entitled to this information, and it was insured's duty to give it (*Jacobs v. Queen Ins. Co.*, 150 N. W. 147, 183 Mich. 512).

A negative answer to question whether any other company had declined insurance on plaintiff's property is correct, although an application had previously been refused by a concern because it did not write that kind of insurance (*Liverpool & London & Globe Ins. Co., Limited, of Liverpool, England, v. Payton*, 194 S. W. 503, 128 Ark. 528). So the answer, "Widow," in response to a question as to the occupation of an applicant for a burglary policy, is not responsive, and proof that she was a married woman is not proof of breach of warranty of the policy (*Linzee v. Frankfort General Ins. Co. of Frankfort-on-the-Main, Germany*, 147 N. Y. Supp. 606, 162 App. Div. 282).

That the principal stockholder of a mercantile corporation did not reveal to an insurance company, on applying for insurance upon the merchandise, that he had previously burned another store to collect insurance thereon, does not render the policy void for fraudulent concealment (*Hamburg-Bremen Fire Ins. Co. of Hamburg, Germany, v. Ohio Valley Dry Goods Co.'s Trustee*, 169 S. W. 724, 160 Ky. 252, Ann. Cas. 1916B, 944).

Under Rev. St. Tex. § 4947, statement in policy indemnifying against loss of dividends from burning of corporation plant, that for three years the corporation had earned dividends of 25 to 30 per cent., has been held not material to the risk, so that its falsity was no defense (*Liverpool & London & Globe Ins. Co. v. Lester* [Tex. Civ. App.] 176 S. W. 602).

1430. (c) Same—Keeping and use of hazardous articles.

1430 (c). In *North British Mercantile Ins. Co. of London & Edinburgh v. Union Stockyards Co.*, 120 Ky. 465, 87 S. W. 285, the facts were as follows: Insured rented to O. either a brick building, or that and a wooden building, both on the same premises, for storing rags. A rider then placed on the policy allowed the storing of rags in the brick building. On the premises being vacated by O., application for return of the unearned portion of the premium for such additional risk was made by W., managing agent of insured, who was asked by insurer's agents whether the rags had been removed, and he, not knowing, said he would ask B., insured's superintendent, and telephoned him to examine and report whether O. had removed the rags. B., who had made the contract of renting, and understood that O. had rented and stored rags in the brick building alone, and who understood the inquiry to refer to such building, though it was intended by insurer's agents to refer to both buildings, they knowing of the storing of rags in both, examined the brick building, and reported that the rags were gone. As a matter of fact, there were still rags in the wooden building. It was held that there was not a misrepresentation which, by provision of the policy, would make it void, B.'s statement being true with reference to the inquiry as he might and did understand it.

1431-1432. (c) Same—Character of property as an insurable risk

1431 (c). Where an agent had no authority to accept or reject applications for insurance on property outside a town, but had only power to receive and forward them to his company, the act of the agent, when application was made for insurance on property outside the town, in declining to furnish it, because he would have to see the property and did not have time, was not a refusal of the company to insure the property, so as to constitute a breach of warranty as to prior rejection of the risk (*Capital Fire Ins. Co. v. King*, 89 Ark. 346, 116 S. W. 894).

1432 (c). In *Parkhurst-Davis Mercantile Co. v. Merchants' Underwriters at the Indemnity Exchange*, 237 Ill. 492, 86 N. E. 1062, affirming 140 Ill. App. 504, it appeared that the agent of the defendant association offered to write a policy on the mercantile stock of insured on the basis of the board rate with 15 per cent. off. The agent was told what the board rate was, and he could not write insurance on the terms proposed. He then offered to make a flat rate less 15 per cent., which offer was accepted, and a policy was is-

sued. The policy was reissued from time to time without request from insured. There was nothing in the policy from which it could be inferred that the rate was fixed with reference to the rate paid for other insurance. It was held that renewal policies were not void for failure of insured to give information as to the cost of other insurance.

Misrepresentations that the moral risk of a policy was first-class, and that the insured had gone out of business because of the sickness of its president, and failure to disclose the insolvency of the insured and the foreclosure of the mortgage against the premises were material misrepresentations which vitiated the policy (*Bank of Ellensburg v. Palatine Ins. Co.*, 143 Pac. 447, 82 Wash. 699).

1433-1435. (f) Same—Previous fires and danger from incendiaries

1433 (f). Where an application of insurance stated that insured had no reason to fear incendiarism, such statement constitutes an express warranty; and evidence that several fires had occurred on farms belonging to the insured's wife, and that he had stated that the fires were of incendiary origin, and were set because of a grudge against him, was improperly excluded as material, in that they tended to show the falsity of such statement (*Donley v. Glens Falls Ins. Co.*, 76 N. E. 914, 184 N. Y. 107, 6 Ann. Cas. 81, reversing 100 App. Div. 69, 91 N. Y. Supp. 302). However, proof that assured had suspected of burning his property certain persons who were dead at the time he answered the clause in an application for fire insurance, "Has any threat of incendiarism been made, or have you reason to fear incendiarism?" in the negative, is no ground for forfeiture of the policy (*Arkansas Mut. Fire Ins. Co. v. Woolverton*, 82 Ark. 476, 102 S. W. 226).

In *Washington Fire Ins. Co. v. Cobb* (Tex. Civ. App.) 163 S. W. 608, it was held that the failure to communicate to the insurance company upon insuring a sanitarium the fact that the cook, because of a mere personal grievance against the manager, threatened to burn the sanitarium would not avoid a policy as a concealment of a material fact concerning the subject of the insurance.

1437. (h) Casualty insurance

1437 (h). A representation in a burglary policy that the insured had never suffered a loss through burglary is not false, though a money order book had been previously lost or stolen (*General Accident, Fire & Life Assur. Corporation v. Stratton*, 178 S. W. 1060, 165 Ky. 754).

Under Vernon's Sayles' Ann. Civ. St. Tex. 1914, art. 4947, false statements as to the ownership of a safe and the price paid for it were no defense to an action on a burglary policy, in the absence of proof that they contributed to the loss or were material to the risk (*Ætna Accident & Liability Co. v. White* [Tex. Civ. App.] 177 S. W. 162).

1437-1438. (i) Questions of practice

1437 (i). Where the defense was that the insured had falsely represented in her application that she had no reason to fear incendiarism, evidence of what the insured's husband said to her, shortly before the insurance was taken out, with reference to fires which had been set on the farm by a particular individual, and that a witness had talked with plaintiff about fires from time to time in the last 20 years, was admissible (*Wells v. Glens Falls Ins. Co.*, 101 N. Y. Supp. 1059, 117 App. Div. 346).

In an action on a fire insurance policy, defended on the ground that it was void because obtained through false representations of the applicant as to his identity, evidence as to the many fires occurring in the business experience of the applicant were admissible on the question of his misrepresentations, and on the question whether the insurer would have issued the policy had he known his identity (*Johnson v. Reliance Ins. Co. of Philadelphia, Pa.*, 168 S. W. 914, 181 Mo. App. 443).

The sufficiency of the evidence to show falsity of statements as to prior refusals to insure is considered in *Capital Fire Ins. Co. v. King*, 89 Ark. 346, 116 S. W. 894. The sufficiency of the evidence in an action on a policy of burglary insurance to show false representation by the insured is considered in *Bankers' Mut. Casualty Co. v. State Bank of Goffs*, 150 Fed. 78, 80 C. C. A. 32.

1438 (i). Whether a single effort by an unknown person to burn the property should cause insured to consider it likely to be repeated, making it the duty of insured to report same to the company, within a provision that the policy shall be void if the hazard be increased by any means within the knowledge of insured, is a question for the jury (*Scottish Union & National Ins. Co. v. Weeks Drug Co.*, 55 Tex. Civ. App. 263, 118 S. W. 1086).

**21. EFFECT OF CONCEALMENT, MISREPRESENTATION, OR
BREACH OF WARRANTY OR CONDITION AS TO PRIOR
INSURANCE**

1439-1441. (b) Stipulations in the nature of conditions precedent

1439 (b). A stipulation in a fire policy that the entire policy, unless otherwise provided by an agreement indorsed thereon or added thereto, shall be void, if the insured now has any contract of insurance, whether valid or not, on the property covered in whole or in part by the policy in question, is valid (*Spann v. Phoenix Ins. Co. of Hartford, Conn.*, 65 S. E. 232, 83 S. C. 262).

Breach of condition, however, of fire policy, for it being void if there be other insurance not indorsed thereon, not contributing to the loss, under 3 Rem. & Bal. Code Wash. § 6059—34 does not avoid liability (*Ramat v. California Ins. Co. of San Francisco*, 164 Pac. 219, 95 Wash. 571).

1442-1444. (d) Effect of false statement, concealment, or breach of condition as dependent on materiality

1443 (d). A false statement as to the existence of other insurance on the property, when the application is made and the contract completed avoids the policy (*Carleton v. Patrons' Androscoggin Mut. Fire Ins. Co.*, 109 Me. 79, 82 Atl. 649, 39 L. R. A. [N. S.] 951).

Likewise a breach of a condition against prior insurance will avoid the policy.

Home Ins. Co. of New York v. Overturf, 74 N. E. 47, 35 Ind. App. 361;
Nabors v. Commercial Union Assur. Co., Limited, of London, England, 51 South. 429, 125 La. 378.

1445. (f) Same—As to other insurance maintained

1445 (f). A valid provision in a rider, that the policy is issued on a warranty by assured that other insurance is in force on the same property in the same proportions and at no higher rate of premiums, constitutes a warranty, falsity of which renders the policy void (*Scharles v. N. Hubbard, Jr., & Co.*, 131 N. Y. Supp. 848, 74 Misc. Rep. 72). But a Lloyd's policy, the going into effect of which was dependent upon the existence of another policy of insurance, did not ipso facto terminate upon the cancellation of such collateral policy (*International Salt Co. v. Tennant*, 144 Ill. App. 30).

1446-1447 AVOIDANCE OF CONTRACT—INSURANCE OF PROPERTY

1446-1447. (h) Construction and sufficiency of disclosure in general

1446 (h). The New York Statute (Laws 1892, p. 1991, c. 690, § 137, as amended by Laws 1894, p. 1378, c. 611, § 1) provides for the appointment of agents to procure policies of fire insurance in corporations not authorized to do business in the state, and requires the filing of affidavits with the insurance department showing that insured was unable to procure the full amount of insurance required from corporations authorized to transact business in the state. It has been held that the fact that an applicant for insurance in such a company, on request for the names of three admitted companies on the risk, gave the names of certain companies which were not on the risk, was no defense to an action, on the policy, where three other admitted companies were in fact upon it (*Hirsch v. Fidelitas Societe Anonyme D'Assurances & De Reassurances*, 99 N. Y. Supp. 517, 50 Misc. Rep. 582).

1448-1449. (j) What constitutes prior insurance—Concurrent insurance

1448 (j). Stipulations in policy of fire insurance that it shall be void if insured has other insurance are valid and reasonable, and, when they are violated, the insurer, when loss occurs, may defend for breach of contract.

Ohio Farmers' Ins. Co. v. Williams (Ind. App.) 112 N. E. 556; *Roper v. National Fire Ins. Co. of Hartford, Conn.*, 76 S. E. 869, 161 N. C. 151.

Fact that party assured against loss by theft had had similar policy from another company withdrawn before issuance of his policy, which, in a schedule, warranted that he had no burglary insurance and had made no application therefor, has been held not a breach of warranty (*Goldberg v. Massachusetts Bonding & Ins. Co.*, 160 N. Y. Supp. 1089, 97 Misc. Rep. 10).

Under Civ. Code S. C. 1912, § 2719, providing that insured shall be estopped to deny truth of statement in application for policy after 60 days; where a fire policy, providing that it should be void if property were insured at or after its issuance, was issued on insured property, policy was valid (*Camden Wholesale Grocery v. National Fire Ins. Co. of Hartford, Conn.*, 91 S. E. 732, 106 S. C. 467).

So under Laws Wash. 1915, p. 703, § 1, providing insured's misrepresentations shall not defeat policy, unless made with intent to deceive, insured's statement that property had been insured in an-

other company, but he did not know whether such policy was still in effect, does not invalidate policy prohibiting other insurance, although such other policy was in force (*Workman v. Royal Exchange Assurance*, 165 Pac. 488, 96 Wash. 559).

1450-1451. (l) Validity of prior policy

1451 (l). An invalid fire policy need not be disclosed in a subsequent application for insurance in the absence of a specific requirement to disclose insurance whether valid or not (*Nabors v. Dixie Mut. Fire Ins. Co.*, 105 S. W. 92, 84 Ark. 184).

1453. (p) Questions of practice—Pleading

1453 (p). If there was, contrary to the provisions of the policy in question, other insurance on the premises insured, or if contrary to such provisions the interest of the assured was other than that mentioned in the policy, such facts are matters of defense, and need not be averred in the declaration (*Scottish Nat. Ins. Co. v. Adams*, 122 Ill. App. 471). An answer denying generally that plaintiff had complied with the conditions of the policy did not put in issue the breach of a warranty or condition against other insurance; it being necessary, where such breach is relied on, to specially allege the warranty and the breach (*Atlas Ins. Co. v. Robison*, 94 Ark. 390, 127 S. W. 456).

1453-1454. (q) Same—Evidence

1453 (q). An insurer has the burden of proving that warranties in a fire policy in regard to other insurance are not true (*Nabors v. Dixie Mut. Fire Ins. Co.*, 105 S. W. 92, 84 Ark. 184).

1454 (q). The evidence was considered insufficient to show that plaintiff had other insurance on his property when defendant issued the policy in *Atlas Ins. Co. v. Robison*, 94 Ark. 390, 127 S. W. 456.

1454. (r) Same—Trial and review

1454 (r). Where, in an action on fire policies defended on the ground of breach of warranty as to other insurance, it was disputed whether insured had informed the insurance agent that, the surrender of such other policies having been demanded, he had mailed them to the insurer, who, however, did not receive them, it was error to give instructions in effect a peremptory direction to find for insured (*Merchants' Fire Ins. Co. v. McAdams*, 115 S. W. 175, 88 Ark. 550).

22. EFFECT OF MISREPRESENTATION, BREACH OF WARRANTY, OR CONCEALMENT AS DEPENDENT ON RELATION TO CAUSE OF LOSS

1457-1458. (c) Statutory provisions

1457 (c). Under the Iowa statute (Code, § 1743) providing that any condition or stipulation in a contract of insurance making the policy void before the loss occurs shall not prevent recovery thereon by the insured, if it shall be shown by the plaintiff that the failure to observe such provision, or the violation thereof, did not contribute to the loss, the burden is on the plaintiff in an action on a policy to show that such violation did not contribute to the loss (*Krell v. Chickasaw Farmers' Mut. Fire Ins. Co.*, 104 N. W. 364, 127 Iowa, 748).

In *Providence Washington Ins. Co. v. Levy & Rosen* (Tex. Civ. App.) 189 S. W. 1035, it was held that Acts Tex. 33d Leg. c. 105, §§ 1-3, enacted to prevent insurance companies from avoiding liability for loss and damage to personal property under technical and immaterial provisions of policy where act breaching such provision has not contributed to bring about loss, is constitutional.

XI. FORFEITURE OF CONTRACT FOR BREACH OF PROMISSORY REPRESENTATIONS OR WARRANTIES OR CONDITIONS SUBSEQUENT—INSURANCE OF PROPERTY

1. NATURE OF CONTINUING OR PROMISSORY WARRANTIES AND REPRESENTATIONS AND OF CONDITIONS SUBSEQUENT

1466-1468. (b) Definition and general characteristics

1466 (b). Warranties are of two kinds; affirmative, which warrant the present or past existence of particular facts, which, if untrue, will avoid the policy, and promissory, which are executory in character, warranting that something shall be done or omitted, breach of which will avoid the policy.

Wilson v. Commercial Union Assur. Co., 90 Vt. 105, 96 Atl. 540; *Miller v. Commercial Union Assur. Co.*, 125 Pac. 782, 69 Wash. 529.

1468-1469. (c) What constitutes a promissory or continuing warranty

1468 (c). The use of the word "warrant" in a stipulation relating to the future does not necessarily make it a warranty (*Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co.*, 59 Wash. 501, 110 Pac. 36, 140 Am. St. Rep. 863, reversing on rehearing 56 Wash. 681, 106 Pac. 194, 28 L. R. A. [N. S.] 593). In *Brown v. Connecticut Fire Ins. Co. of Hartford, Conn.* (Okl.) 153 Pac. 173, however, a forfeiture clause was held to be a promissory warranty and to render the policy an indivisible contract.

1470-1472. (e) Same—Statements in present and by way of description

1471 (e). A promissory warranty has reference only to something to be done or omitted in the future, and cannot be predicated on statements as to existing or past conditions.

Scottish Union & National Ins. Co. v. Wade, 59 Tex. Civ. App. 631, 127 S. W. 1186; *Miller v. Commercial Union Assur. Co.*, 69 Wash. 529, 125 Pac. 782.

1472 (e). Generally a continuing warranty cannot be based on statements which are merely matters of description (*Silver v. London Assur. Corp.*, 61 Wash. 593, 112 Pac. 666).

1472-1474 FORFEITURE OF CONTRACT—INSURANCE OF PROPERTY

1472-1474. (f) Same—Qualification of rule

1472 (f). The general rule that statements which are matter of description merely are not continuing warranties is qualified, where the statement relates to matters obviously material to the risk, and in such instances the statement, though relating to existing facts, may be construed as a continuing warranty (*Columbian Exposition Salvage Co. v. Union Casualty & Security Co.*, 123 Ill. App. 245, affirmed in 220 Ill. 172, 77 N. E. 128).

1474-1477. (g) Same—Statements or stipulations made part of the policy

1475 (g). Where an application addressed to a particular company contained a statement which was expressly made a continuing warranty, and the application was forwarded to one who was agent for the company addressed and for other companies, and he split the insurance up, putting a portion of it in each company, the application was no part of the contract between insured and the companies other than the one addressed, so as to make such statements continuing warranties as to them (*Waukau Milling Co. v. Citizens' Mut. Fire Ins. Co.*, 130 Wis. 47, 109 N. W. 937, 118 Am. St. Rep. 998, 10 Ann. Cas. 795).

**2. EFFECT OF BREACH OF CONTINUING OR PROMISSORY WARRANTIES AND REPRESENTATIONS OR OF CONDITIONS
SUBSEQUENT**

1482-1484. (a) Construction of provisions creating forfeitures

1482 (a). Forfeitures of policies are not favored, and a court will not declare a forfeiture by implication (*Connecticut Fire Ins. Co. v. Colorado Leasing, Min. & Mill. Co.*, 116 Pac. 154, 50 Colo. 424, Ann. Cas. 1912C, 597). So, while a warranty in an application relating to an existing fact must be literally true, that which is promissory in its nature is not so strictly construed and in the later cases is sufficient if substantially true or performed (*National Live Stock Ins. Co. v. Owens* [Ind. App.] 113 N. E. 1024). But where an adult of sound mind, who can read and write, accepts a policy containing unambiguous stipulations material to the risk which forfeit it for their breach, and the company makes no misleading representations as to their meaning, the stipulations become a part of the insurance contract so as to avoid it upon their breach, even though there was no previous application, and no express representations made by insured (*Lancaster v. Southern*

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Ins. Co., 69 S. E. 214, 153 N. C. 285, 138 Am. St. Rep. 665). And if one voluntarily accepts a fire policy, no fraud being practiced, in an action thereon the company may base its defense on the failure of insured to comply with any lawful provision of the policy (Southern Home Ins. Co. v. Putnal, 57 Fla. 199, 49 South. 922).

In *Macatawa Transp. Co. v. Firemen's Fund Ins. Co.*, 146 N. W. 396, 179 Mich. 443, the term "survey," as used in marine insurance, was defined, and it was held that, so far as the representations therein were executory, or related to the subsequent use or occupation of the premises, the owner was not bound thereby.

**1485-1489. (e) What constitutes breach of warranty or condition—
Strict or substantial compliance**

1486 (c). The general rule is that as to promissory warranties and conditions subsequent substantial compliance therewith by the insured is sufficient.

Finkbohner v. Glens Falls Ins. Co., 6 Cal. App. 379, 92 Pac. 318; *Brickell v. Atlas Assur. Co.*, 10 Cal. App. 17, 101 Pac. 16; *Hamann v. Nebraska Underwriters' Ins. Co. of Omaha*, 82 Neb. 429, 118 N. W. 65; *North British & Mercantile Ins. Co. v. Nidiffer*, 112 Va. 591, 72 S. E. 130, Ann. Cas. 1916A, 464; *Tucker v. Colonial Fire Ins. Co.*, 51 S. E. 86, 58 W. Va. 30.

1499-1501. (3) Effect as dependent on knowledge and intent of insured—Responsibility of insured for acts of third persons

1499 (i). A stipulation in a fire policy that it shall be void if the risk be increased by any means within the knowledge of insured does not include an increase of risk by the acts of persons with whom insured has no connection and over whom he has no control (*Liverpool & London & Globe Ins. Co. v. Lavine*, 59 South. 336, 5 Ala. App. 392). So the policy is not avoided by acts of a tenant increasing the hazard which are not within the owner's knowledge (*Royal Exch. Assurance of London v. Thrower* [D. C.] 240 Fed. 811).

1501-1504. (k) Statutory provisions

1502 (k). Kirby's Dig. Ark. § 4375a, declaring that, in actions against any fire insurance company on a claim arising out of a policy on personal property, a substantial compliance with the terms, conditions, and warranties of the policy shall be sufficient

1501-1504 FORFEITURE OF CONTRACT—INSURANCE OF PROPERTY

to entitle plaintiff to recover, has no application to a policy on realty (*Capital Fire Ins. Co. v. King*, 82 Ark. 400, 102 S. W. 194).

Rev. St. Neb. 1913, § 3187, relating to breach of warranty or condition, does not apply to case where insurance company has never entered into contractual relations with person claiming under policy (*Stephenson v. Germania Fire Ins. Co.*, 160 N. W. 962, 100 Neb. 456, L. R. A. 1917D, 307).

Acts Tex. 33d Leg. c. 105 (Vernon's Sayles' Ann. Civ. St. 1914, arts. 4874a, 4874b), as to "technical" breaches of fire insurance policy, is constitutional (*Ætna Ins. Co. v. Waco Co.* [Tex. Civ. App.] 189 S. W. 315); and the breach of mere technical or immaterial provisions in an insurance policy which does not contribute to the loss will not defeat or forfeit a right under the policy (*McPherson v. Camden Fire Ins. Co.* [Tex. Civ. App.] 185 S. W. 1055).

3. PLEADING AND PRACTICE RELATING TO BREACH OF PROMISSORY WARRANTY OR CONDITION

1505-1507. (a) Pleading—General rules

1505 (a). It has been held in *Bank of Anderson v. Home Ins. Co. of New York*, 14 Cal. App. 208, 111 Pac. 507, that plaintiff must plead performance of promissory warranties, though as appears by the authorities cited in the original text this does not seem to be the general rule.

1506 (a). The breach of a condition subsequent, to be available as a defense, must be specially pleaded.

Bank of Anderson v. Home Ins. Co., of New York, 14 Cal. App. 208, 111 Pac. 507; *National Mut. Fire Ins. Co. v. Sprague*, 40 Colo. 344, 92 Pac. 227; *Allen v. Phoenix Assur. Co.*, 12 Idaho, 653, 88 Pac. 245, 8 L. R. A. (N. S.) 903, 10 Ann. Cas. 328; *American Ins. Co. v. Egyptian Lodge No. 802*, I. O. O. F., 128 Ill. App. 161; *Home Ins. Co. v. Gagen*, 38 Ind. App. 680, 76 N. E. 927; *Western Assur. Co. v. Ferrell* (Miss.) 40 South. 8; *Glinners' Mut. Underwriters v. Wiley & House* (Tex. Civ. App.) 147 S. W. 629; *Kline Bros. & Co. v. Royal Ins. Co. (C. C.)* 192 Fed. 378. But see *Rochester German Ins. Co. v. Monumental Sav. Ass'n*, 107 Va. 701, 60 S. E. 93, holding that in an action on a policy conditioned that it shall be void if insured's interest be other than unconditional and sole ownership, or if any change other than by insured's death takes place in the interest, title, or possession, etc., breach of the conditions need not be specially pleaded as a defense, but evidence thereof may be introduced under the general issue.

1507-1508. (b) Same—Sufficiency of declaration or complaint

1508 (b). An allegation of due performance in an action on a burglary insurance policy does not amount to an averment of non-violation of the conditions of the policy, such as one requiring insured to keep books of account, so as to require a specified denial in the answer (*Spingarn v. National Surety Co. of New York*, 134 N. Y. Supp. 817, 76 Misc. Rep. 248).

1511-1513. (c) Evidence—Presumptions and burden of proof

1511 (c). Where plaintiff alleges that all the conditions of the policy have been performed by him, and the allegation is denied by the defendant's answer, such denial does not require plaintiff to prove compliance with the conditions in reference to forfeitures, as a part of his case (*Thompson Bros. v. Piedmont Mut. Ins. Co.*, 57 S. E. 848, 77 S. C. 294). On the contrary, the burden of proof is on the insurer to show a breach of conditions in the policy.

Arkansas Mut. Fire Ins. Co. v. Stuckney, 85 Ark. 33, 106 S. W. 203; *Keane v. Century Fire Ins. Co.*, 150 Iowa, 658, 130 N. W. 724; *Harris v. North American Ins. Co.*, 190 Mass. 361, 77 N. E. 493, 4 L. R. A. (N. S.) 1137; *Walton v. Phoenix Ins. Co.*, 162 Mo. App. 816, 141 S. W. 1138; *Port Blakely Mill Co. v. Hartford Fire Ins. Co.*, 50 Wash. 657, 97 Pac. 781; *Olympia Brewing Co. v. Pioneer Mut. Ins. Ass'n*, 53 Wash. 16, 101 Pac. 371; *Kentucky Vermillion Mining & Concentrating Co. v. Norwich Union Fire Ins. Soc.*, 146 Fed. 695, 77 C. C. A. 121. But see *Johnson v. Mercantile Town Mut. Fire Ins. Co.*, 120 Mo. App. 80, 96 S. W. 697; *E. C. Winson & Son v. Mutual Fire & Tornado Ass'n*, 153 N. W. 97, 170 Iowa, 521 (under statute); *Lagden v. Concordia Mut. Fire Ins. Co. of Bay, Saginaw, and Arenac Counties*, 154 N. W. 87, 188 Mich. 689 (under statute).

1513-1515. (f) Same—Admissibility and sufficiency

1514 (f). The sufficiency of the evidence to show compliance with conditions subsequent was considered in *Kentucky Vermillion Mining & Concentrating Co. v. Norwich Union Fire Ins. Soc.*, 146 Fed. 695, 77 C. C. A. 121, and *Rochester German Ins. Co. v. Monumental Sav. Ass'n*, 107 Va. 701, 60 S. E. 93.

4. PERSONS AFFECTED BY FORFEITURE

1521-1525. (c) Loss payable to mortgagee as interest may appear

1521 (c). The mortgagee under a loss payable clause has no greater rights than the insured, and is therefore affected by a forfeiture the same as the insured (*Woodard v. German American Ins. Co. of New York*, 128 Wis. 1, 106 N. W. 681, 116 Am. St. Rep. 17).

1523 (c). In *Welch v. British-American Assur. Co.*, 148 Cal. 223, 82 Pac. 964, 113 Am. St. Rep. 223, 7 Ann. Cas. 396, the facts were these: The California statute (Civ. Code, § 2541) provides that where a mortgagor effects insurance in his own name, the loss to be payable to the mortgagee, or assigns a policy of insurance to the mortgagee, the insurance is deemed to be upon the interest of the mortgagor, and any act of his which would otherwise avoid the insurance will have the same effect, although the property is in the hands of the mortgagee. Section 1442 provides that a condition involving a forfeiture must be strictly interpreted. Section 1654 provides that in cases of uncertainty in the interpretation of contracts the language of a contract must be interpreted most strongly against the one who caused the uncertainty. A fire policy provided that, unless otherwise provided by agreement indorsed thereon, it should be void if any change should take place in the title of the property, and provided that, if an interest "shall exist in favor of a mortgagee, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interests as shall be written upon, attached, or suspended hereto." Subsequent provisions declared that the policy was "subject to the foregoing stipulations and conditions," and that no privilege or permission affecting the insurance should ever be claimed by insured unless written or attached to the policy. After the issuance of a fire policy the premises were mortgaged, and the insurer indorsed on the policy a statement that the loss should be payable to the mortgagee and thereafter the mortgagor sold the premises. It was held that the mortgagee was entitled to recover for a loss, since by virtue of the mortgage clause the interest of the mortgagee was free from all such conditions, except such as were at the time of the creation of his interest written upon the policy or attached or appended thereto.

In *Edge v. St. Paul Fire & Marine Ins. Co.*, 20 S. D. 190, 105 N.

W. 281, the policy was payable to a certain mortgagee as his interest might appear, and it was provided that the policy should be void if any change, other than the death of insured, should take place in the interest or title of the property without consent of the insurer indorsed thereon, and also that "if, with the consent of this company, an interest shall exist in favor of a mortgagee, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interests as shall be written upon, attached, or appended hereto." It was held that, though insured subsequently sold the property without the insurer's consent, the mortgagee was entitled to recover for a loss; no condition as to change of interest having been written upon, attached, or appended to the provision by which the interest of the mortgagee was created. A similar condition as to interest of the mortgagee was involved in *Vancouver Nat. Bank v. Law Union & Crown Ins. Co.* (C. C.) 153 Fed. 440, and it was held that the conditions in the policy applied to the interest of a mortgagee or other person having an interest in the policy in all events, but as modified by whatever may be written upon the slip attached to the policy.

In *Bank of Ellensburg v. Palatine Ins. Co.*, 82 Wash. 55, 143 Pac. 447, a policy containing a provision voiding it on mortgage foreclosure was held a contract between the mortgagee, to whom loss was payable, and the insurance company for the benefit of the former.

1525-1527. (d) Rights of mortgagee under "union mortgage clause"

1526 (d). The mortgage clause in the standard fire policy, providing that the insurance as to the interest of the mortgagee shall not be invalidated by any act or neglect of the owner of the property covered by the policy, creates a new and distinct contract, which places the mortgagee on a different footing from that of a mere assignee or appointee to receive the loss and the contracts with the owner and the mortgagee are separate, in which each is subject only to the obligations expressly imposed on him.

People's Sav. Bank v. Retail Merchants' Mut. Fire Ins. Ass'n of Iowa, 146 Iowa, 536, 123 N. W. 198, 31 L. R. A. (N. S.) 455; *Towle v. Dirigo Mut. Fire Ins. Co.*, 107 Me. 317, 78 Atl. 374; *Union Institution for Savings in City of Boston v. Phoenix Ins. Co.*, 196 Mass. 230, 81 N. E. 994, 14 L. R. A. (N. S.) 459, 13 Ann. Cas. 433; *Flint v. Westchester Fire Ins. Co.*, 207 Mass. 337, 93 N. E. 646; *Moore v. Sun Ins. Co.*, 100 Minn. 374, 111 N. W. 260; *Reed v. Newark*

1527-1529 FORFEITURE OF CONTRACT—INSURANCE OF PROPERTY

Fire Ins. Co., 74 N. J. Law, 400, 65 Atl. 1053; *Helebrunn v. German Alliance Ins. Co.*, 140 App. Div. 557, 125 N. Y. Supp. 374; 140 App. Div. 936, 126 N. Y. Supp. 1131; *Roper v. National Fire Ins. Co. of Hartford*, 76 S. E. 869, 161 N. C. 151.

1527-1529. (e) Same—Notice by mortgagee

1528 (e). Where the tenant of a piece of land erected a building, which was insured in favor of a mortgagee of the building by a policy requiring the mortgagee to notify the insurer of any change of ownership or occupation, and the landlord executed a warrant of dispossession against the tenant, the failure of the mortgagee to give the insurer notice of the change in the occupancy avoided the policy (*Adolph G. Huppfel & Sons v. Boston Fire Ins. Co.*, 104 N. Y. Supp. 659, 55 Misc. Rep. 125).

1530-1531. (g) Assignee of policy

1530 (g). Where the assignment is of such a nature that it is in effect merely an assignment of the claim for loss, the rights of the assignee are merely those of the insured, and if the latter's rights have been forfeited, the assignee cannot recover.

Heyl v. Aetna Ins. Co., 38 South. 118, 144 Ala. 549; *Towle v. Dirigo Mut. Fire Ins. Co.*, 107 Me. 317, 78 Atl. 374.

In *Reliance Ins. Co. of Philadelphia v. Dalton* (Tex. Civ. App.) 178 S. W. 966, rehearing denied (Tex. Civ. App.) 180 S. W. 668, an assignee of a fire insurance policy was held precluded from claiming that the building was not properly classified and that the provisions in the policy in regard to additional insurance were invalid.

1531-1533. (h) Same—Assignment as creation of new contract

1531 (h). In some jurisdictions the assignment of the policy with the consent of the insurer creates a new contract between the assignee and the insurer, which cannot be affected by any act of the insured.

National Fire Ins. Co. v. J. W. Caraway & Co., 60 Tex. Civ. App. 566, 130 S. W. 458; *Dumphy v. Commercial Union Assur. Co., Limited* (Tex. Civ. App.) 142 S. W. 116.

In the *Dumphy Case*, cited above, the facts were these: The policy provided that it should be void if "the insured" should have or procure any other contract of insurance on the property covered. Plaintiff, having sold the property on time, assigned the policy with the insurer's consent, a rider being added providing that

any loss ascertained and proven to be due "assured" under the policy should be payable to plaintiff as her interest might appear. Following the provision in the policy against additional insurance was a provision that if with the consent of the insurer an interest under the policy shall exist in favor of a mortgagee, or any other person, or corporation having an interest in the subject of the insurance other than the interest of the insured, the conditions "hereinbefore contained shall apply in the manner expressed in such provisions, and conditions of insurance relating to such interest as shall be written upon, attached, or appended to the policy." It was held that the conditions referred to in such provision were not those contained in the rider, but those contained in the policy, and the grantee of the property, and not the grantor, being the "assured" within the rider, plaintiff could only recover in case of loss such an amount as could be recovered by the grantee, and was therefore subject to the defense that the policy was void because of the grantee procuring additional insurance without the insurer's consent.

1535-1536. (j) Same—Assignment as collateral security

1535 (j). Where a policy is assigned as collateral security, the assignee can only recover where his assignor could have done so, had no assignment been made. If at the time of the assignment the policy was void because of additional insurance taken by the insured without the consent of the company, the assignee can recover nothing (*Heine v. Lancaster County Mut. Ins. Co.*, 49 Pa. Super. Ct. 501).

5. NECESSITY AND SUFFICIENCY OF PROCEEDINGS TO GIVE EFFECT TO FORFEITURE

1540. (e) Breach as rendering policy void or only voidable—Wisconsin

1540 (e). In *Stutzman v. Cicero Mut. Fire Ins. Co.*, 150 Wis. 254, 136 N. W. 604, it was held that provisions forfeiting the policy for nonpayment of assessments are self-executing.

1541-1542. (f) Same—Other states

1541 (f). A breach of the condition rendering a policy void on nonpayment of assessments forfeits the policy ipso facto.

Russell v. Oxford County Patrons of Husbandry Mut. Fire Ins. Co., 107 Me. 362, 78 Atl. 459; *Mutual Fire Ins. Co. of Portland v. Maple*, 60 Or. 359, 119 Pac. 484, 38 L. R. A. (N. S.) 726.

1541-1542 FORFEITURE OF CONTRACT—INSURANCE OF PROPERTY

A breach of condition is regarded as rendering the policy voidable only, and not void, in *Queen of Arkansas Ins. Co. v. Forlines*, 94 Ark. 227, 126 S. W. 719, and *Southern Nat. Ins. Co. v. Barr* (Tex. Civ. App.) 148 S. W. 845. The same position has also been taken in *Indiana* (*Western Ins. Co. v. Ashby*, 102 N. E. 45, 53 Ind. App. 518; *Caledonian Ins. Co. v. Indiana Reduction Co.* [Ind. App.] 115 N. E. 596), in *Florida* (*Palatine Ins. Co. v. Whitfield*, 74 South. 869), and under statute in *South Dakota* (*Schultz v. Des Moines Mut. Hail & Cyclone Ins. Ass'n*, 153 N. W. 884, 35 S. D. 627, Ann. Cas. 1917D, 78).

1542-1543. (g) Sufficiency of proceedings declaring forfeiture

1542 (g). Where an insurer was entitled to rely on the insured's breach of condition, the insurer, by virtue of the stipulations of the policy providing that, on the same becoming void, the unearned portion of the premium should be returned, could plead the breach, and tender with the plea the unearned portion of the premium. And if the insurer denied liability on several policies, and tendered the unearned premium as to all, and liability was established as to some of them, the tender was good as to that policy on which it was not liable (*Ætna Ins. Co. v. Mount*, 90 Miss. 642, 44 South. 162, 15 L. R. A. [N. S.] 471).

6. GROUNDS OF FORFEITURE OF MARINE POLICIES IN GENERAL

1544-1547. (b) Matters relating to the risk in general

1545 (b). In *Macatawa Transp. Co. v. Fireman's Fund Ins. Co.*, 168 Mich. 365, 134 N. W. 193, Ann. Cas. 1913C, 69, the application for insurance on a boat asked for the location and description of the building in which the boat would be laid up, and the answer was that it would be laid up in the water at a certain bay. The policy stipulated that while laid up the boat should be "safely stored at outside," and granted the privilege to lay up either afloat or ashore. It was held that the policy, construed as it must be with the application, signified that the boat should be stored outside of the shore, afloat in the waters of the bay. And in the same case it was held, further, that a continuing warranty that the boat should not be within 500 feet of exposing buildings must be construed as meaning such buildings as would increase the risk. But if, at the time of the burning of the boat, it was within 500 feet of exposing buildings,

the policy was void, though such buildings had no influence on the loss; but, if the exposing buildings had ceased to be such at the time of the fire, the insured could recover on the policy in view of the provisions of the Michigan statute (Compiled Laws of 1897, § 5180) declaring that no policy should be void for breach of any condition if the insurer had not been injured thereby.

Where a dredge being towed on a journey in midwinter, was insured, the fact that barges were attached to and towed by the dredge was a material question affecting the risk (California Reclamation Co. v. New Zealand Ins. Co., 138 Pac. 960, 23 Cal. App. 611).

1547-1549. (e) Additional insurance

1547 (c). Where a carrier's marine policy did not cover any goods or merchandise on which there should be any existing insurance by or on account of the owners thereof, the term "existing insurance" included any other insurance during the continuance of the risk, which was valid and enforceable, and was not limited to insurance by the owner existing at the time the carrier's policy attached (Lehigh Valley R. Co. v. Providence-Washington Ins. Co. [D. C.] 167 Fed. 223, decree affirmed 172 Fed. 364, 97 C. C. A. 62).

1551-1553. (e) Sailing, voyage, and navigation of vessel

1551 (e). A policy insuring a ship for a voyage insures only for the particular voyage which must be prosecuted with diligence and by the most direct and practicable known route (Northwestern S. S. Co. v. Maritime Ins. Co. [C. C.] 161 Fed. 166).

In Canton Ins. Office v. Independent Transp. Co., 217 Fed. 213, 133 C. C. A. 207, L. R. A. 1915C, 408, time policies on a vessel "warranted employed in the general passenger and freighting business on Puget Sound * * *" were held avoided for breach of such warranty.

1553-1557. (f) Maintenance of seaworthiness

1554 (f). The ship must be seaworthy at the commencement of the voyage, and at the commencement of each successive stage of the voyage, and every reasonable precaution for the safety of the ship and cargo must be taken so that the voyage may be terminated without unnecessary delay, and without loss to either the owner or insurer; the adoption of customary and reasonable means to promote the success of the venture, and to avoid known dangers, is not a ground for exempting the insurer from the liabilities expressed in the policy (Northwestern S. S. Co. v. Maritime Ins. Co. [C. C.]

1563-1564 FORFEITURE OF CONTRACT—INSURANCE OF PROPERTY

161 Fed. 166). If, however, it appears that the vessel was seaworthy when the policy was issued, it is to be presumed that it remained seaworthy until the time it sprang a leak and sank (*Paddock-Hawley Iron Co. v. Providence-Washington Ins. Co. of Providence, R. I.*, 93 S. W. 358, 118 Mo. App. 85).

1563-1564. (l) Nationality or neutrality of vessel or cargo

1564 (l). A policy is not avoided by the fact that an agent of the consignee and owner of the cargo sent from China to inspect the same and deliver it to the consignee was made freight clerk on the vessel on the voyage, there being no evidence that he was in any way connected with the Russian government (*Northwestern S. S. Co. v. Maritime Ins. Co.* [C. C.] 161 Fed. 166).

1564-1566. (m) Questions of practice

1565 (m). As between owner and insurer, the burden of proving that a vessel is unseaworthy rests upon the insurer (*Fireman's Fund Ins. Co. v. Globe Nav. Co.*, 236 Fed. 618, 149 C. C. A. 614).

Clear and convincing evidence is required on the part of an insurer to overcome the report of a survey, when a vessel commenced a voyage, showing that she was then seaworthy for the voyage (*Fireman's Fund Ins. Co. v. Globe Nav. Co.*, 236 Fed. 618, 149 C. C. A. 614).

1566 (m). Whether the insurer under a policy covering a yacht and stipulating that the vessel should be laid up between designated dates waived a breach by insured during that period by attempting to sail the vessel to a safe harbor is a question of fact (*Robinson v. Insurance Co. of North America*, 198 N. Y. 523, 91 N. E. 373, reversing 129 App. Div. 1, 113 N. Y. Supp. 105).

Where a policy on a barge provided that it should at all times during the continuance of the policy be in a seaworthy condition, and tight and sound, in an action on the policy, it appearing that the barge remained tight and sound and that it did not leak until it sprang a leak and sank, an instruction was not erroneous for failure to require the jury to find that the barge remained seaworthy until it sank (*Paddock-Hawley Iron Co. v. Providence-Washington Ins. Co. of Providence, R. I.*, 93 S. W. 358, 118 Mo. App. 85).

7. DEVIATION OR OTHER CHANGE OF VOYAGE**1578-1580. (f) Change in order or omission of specified ports—Touching at ports not specified**

1579 (f). In *Northwestern S. S. Co. v. Maritime Ins. Co.* (C. C.) 161 Fed. 166, it appeared that the owner of the vessel before she sailed gave the master a letter of special instructions directing him to proceed to Dutch Harbor, to coal there, and then to proceed by a designated route through the Okhotsk Sea to Vladivostok. She coaled at Dutch Harbor, but in the Okhotsk Sea was caught in floating ice, which was unusual at that season, and detained for 40 days, and was then compelled to make for the nearest port for provisions and coal, and it was while on such deviation that she was captured. The policy contained a clause permitting the ship to "sail to, touch, and stay at any ports or places whatsoever without prejudice to this insurance." It was held that none of such matters constituted a defense against liability on the policy, the route taken being the most direct and ordinarily safe, the stopping to coal being within the terms of the policy, and, moreover, a proper act in view of the length of the voyage, and the letter of instructions and false documents carried not having been intended to deceive in case of capture, since they were surrendered with others showing the true facts, but were furnished and the route prescribed merely as a precaution against capture, which the owner, as between itself and the insurer, owed to the latter.

1588-1590. (l) Usage

1589 (l). The right of a charterer to recover on a policy insuring freight is not defeated because the vessel went into dry dock with cargo on board, which was lost, where it was in accordance with a general custom of the port (*The Indrapura* [D. C.] 238 Fed. 853).

9. CHANGE IN GENERAL CONDITION AND LOCATION OF THE PROPERTY INSURED**1599-1603. (b) Repairs, alterations, and additions**

1600 (b). It did not constitute a "change in the conditions and circumstances of the risk," within a burglary policy, to permit workmen to be employed in painting insured's house and relaying floors therein without first obtaining insurer's written consent

1599-1603 FORFEITURE OF CONTRACT—INSURANCE OF PROPERTY

(*Graf v. National Surety Co. of New York*, 131 N. Y. Supp. 548, 146 App. Div. 782, reversing judgment 126 N. Y. Supp. 616, 70 Misc. Rep. 243). So employment of mechanics in alterations has been held not to forfeit the policy unless it increased the risk (*Gilman v. Commonwealth Ins. Co. of New York*, 92 Atl. 721, 112 Me. 528, L. R. A. 1915C, 758); and where a fire policy containing a rider permitting ordinary repairs was delivered by defendant's agent to whom the contemplated repairs had been explained, insured was entitled to assume that the insurer knew the purpose of attaching the rider (*Miller v. Spring Garden Ins. Co.*, 202 Fed. 442, 120 C. C. A. 548).

It is immaterial whether a promise to repair defects in insured property is a warranty or a representation, where the promise is by reference included in the contract of insurance, is relied on by the insurer, and its purpose is to reduce the risk (*Mendenhall v. Farmers' Ins. Co. of Kokomo*, 110 N. E. 60, 183 Ind. 694).

1603 (b). Whether the building of an addition or alteration to the insured property after the issuance of the policy increased the hazard, so as to avoid the policy, is a question of fact in an action on the policy.

Loyal Mut. Fire Ins. Co. v. J. S. Brown & Bro. Mercantile Co., 107 Pac. 1098, 47 Colo. 467; *John Sommer Faucet Co. v. Commercial Casualty Ins. Co.*, 99 Atl. 342, 89 N. J. Law, 693; *Gilman v. Commonwealth Ins. Co. of New York*, 92 Atl. 721, 112 Me. 528, L. R. A. 1915C, 758.

1603-1606. (c) Same—Builder's risk

1605 (c). A provision that the working of carpenters, etc., in building or repairing the premises without permission of the insurer will avoid the policy, does not apply to repairs necessary for the preservation of the property (*Lebanon County v. Franklin Fire Ins. Co. of Philadelphia*, 85 Atl. 419, 237 Pa. 360, 44 L. R. A. [N. S.] 148, Ann. Cas. 1914B, 130). And where the policy provided that the insurance should be void, if mechanics were employed upon the building for more than 15 days at any one time without the consent of the company, the insurance was void as a matter of law, where the owner started on the work of raising the building, to be carried on from the commencement of the work to completion by different contractors, no one of whom exceeded the 15-day limit, but the work covered at least 30 days, though not consecutively, before its completion (*Robb v. Millers' Mut. Fire Ins. Co.*, 79 Atl. 150, 230 Pa. 44).

A permit "for mechanics to work in and about the premises 30 days from date" was effective for the purpose of preventing a forfeiture under a provision providing therefor in case of an increase of the risk (*Harris v. North American Ins. Co.*, 77 N. E. 493, 190 Mass. 361, 4 L. R. A. [N. S.] 1137).

1606 (c). In *Scottish Union & National Ins. Co. v. Encampment Smelting Co.*, 166 Fed. 231, 92 C. C. A. 139, the policies covered a builder's risk on the building and machinery of an ore mill. The policies provided that the premises should not be "occupied" for a longer period than 30 days without special permission and a readjustment of the rate. The owner started the machinery 33 days before it was destroyed by fire, but less than a full hour's work was done in either of the first three days. It was held that whether the premises were "occupied" during such three days, or whether their use was merely experimental, was a question of fact.

1606-1607. (d) Same—Increase of risk

1607 (d). There was an increase of risk in violation of the provisions of the policy, by dividing the house into three distinct parts after the policy was issued, and having each part occupied as apartments (*Simpson v. Mecca Fire Ins. Co. of Waco* [Tex. Civ. App.] 133 S. W. 491).

Whether the insurance risk on lumber was increased by the erection of an asbestos roof over the same, was, the evidence being conflicting, a question for the jury (*Greenwich Ins. Co. v. State*, 84 S. W. 1025, 74 Ark. 72). The sufficiency of evidence was considered in *Royal Exch. Assurance of London v. Thrower* (D. C.) 240 Fed. 811.

1609-1612. (f) Falling of building

1610 (f). In order to exempt the insurer from liability under the provision of a policy that all insurance should cease if the building or any part thereof fall, except as the result of fire, a material or substantial part of the building must have fallen.

Clayburgh v. Agricultural Ins. Co. of Watertown, 155 Cal. 708, 102 Pac. 812, 18 Ann. Cas. 579; *Fountain v. Connecticut Fire Ins. Co.*, 158 Cal. 760, 112 Pac. 546, 139 Am. St. Rep. 214; *Loomis v. Connecticut Fire Ins. Co.*, 16 Cal. App. 532, 117 Pac. 642; *Moodey v. Connecticut Fire Ins. Co., of Hartford, Conn.*, 160 Cal. 630, 117 Pac. 773; *Foster v. Home Ins. Co.*, 143 Fed. 307, 74 C. C. A. 445.

A provision that if the building or any part thereof fall, except as a result of fire, all insurance on the building or contents shall

cease, releases the company from liability where the building falls as a structure or such a substantial part thereof falls as to impair its usefulness as a building (*Fountain v. Connecticut Fire Ins. Co. of Hartford* [Cal. App.] 117 Pac. 630). The building must have fallen to such an extent that its integrity as a building is destroyed or substantially impaired, so as to render it unsuitable for use as an entire building, or so that the falling of part exposed the interior of the building or its contents to the inclemency of the weather, or rendered the building or its contents more easily subject to ignition by fire, and thereby materially impaired the building as a building (*Clayburgh v. Agricultural Ins. Co. of Watertown, N. Y.*, 102 Pac. 812, 155 Cal. 708, 18 Ann. Cas. 579).

An instruction that such a part of the building must have fallen as would destroy its distinctive character as a building in order to avoid the policy was too vague as to what portion of the building must have fallen. *Davis v. Connecticut Fire Ins. Co.*, 112 P. 549, 158 Cal. 766, 32 L. R. A. (N. S.) 604.

In *Fountain v. Connecticut Fire Ins. Co.*, 158 Cal. 760, 112 Pac. 546, 139 Am. St. Rep. 214, the company claimed that the building was caused to partially fall by an earthquake before the fire started, and its evidence showed that, before the fire started, the front wall of the building from the roof to the second floor had fallen down, leaving the roof unsupported in front, so that the front part of it rested upon the second floor. Insured's evidence was that the upper stories had "great chunks out of them," and that the building could not be occupied until repaired. It was held that the evidence both of insured and the company showed that a substantial part of the building had fallen when the fire started, so as to avoid the policy.

It would seem that whether or not the risk was increased by the falling of the building or a part thereof is immaterial.

Fountain v. Connecticut Fire Ins. Co., 158 Cal. 760, 112 Pac. 546, 139 Am. St. Rep. 214; *Moodey v. Connecticut Fire Ins. Co. of Hartford, Conn.*, 160 Cal. 630, 117 Pac. 773. But compare *Fountain v. Connecticut Fire Ins. Co.* (Cal. App.) 117 Pac. 630.

1611 (f). The condition does not apply to avoid the policy if the building or any part thereof falls after the fire starts where the insurance is on the building, and perhaps even where it is only on the goods therein, nor does it apply to avoid the policy where the goods had begun to burn before the fall occurred (*Davis v. Connecticut Fire Ins. Co.*, 112 Pac. 549, 158 Cal. 766, 32 L.

R. A. [N. S.] 604). And to the same effect is *Loomis v. Connecticut Fire Ins. Co.*, 16 Cal. App. 532, 117 Pac. 642.

1612 (f). Where the insurer claimed that a material part of the building fell from an earthquake shock before the fire started evidence as to the effect of the earthquake upon other buildings located in the block and as to the condition of the whole block after the earthquake was properly excluded, in the absence of a showing that the construction of the other buildings was substantially similar to that of the building containing the insured goods, and that the force of the earthquake was practically uniform.

Fountain v. Connecticut Fire Ins. Co. (Cal. App.) 117 Pac. 630; *Loomis v. Connecticut Fire Ins. Co.*, 16 Cal. App. 532, 117 Pac. 642..

The sufficiency of the evidence to show whether or not the fire started in the building before it, or a part thereof, fell as a result of earthquake, is considered in *Fountain v. Connecticut Fire Ins. Co.*, 112 Pac. 546, 158 Cal. 760, 139 Am. St. Rep. 214; *Davis v. Connecticut Fire Ins. Co.*, 112 Pac. 549, 158 Cal. 766, 32 L. R. A. (N. S.) 604; *Fountain v. Connecticut Fire Ins. Co. of Hartford* (Cal. App.) 117 Pac. 630; *Loomis v. Connecticut Fire Ins. Co.*, 16 Cal. App. 532, 117 Pac. 642.

1615-1616. (h) Erection of buildings on adjacent premises—Increase of risk

1616 (h). Whether the erection of a building near the storehouse of assured was an additional risk was for the jury, and was not a question to determine which expert knowledge was proper (*Prudential Fire Ins. Co. v. Alley*, 51 S. E. 812, 104 Va. 356).

1620-1622. (l) Change in location of personal property insured—Consent to removal of property

1621 (l). A policy, with a rider attached permitting a removal of the property to another location and providing that it should cover the property "in both locations during the removal," does not cover the property temporarily stored in a building other than the building in which it was insured, with a view to the subsequent removal to the new location (*Palatine Ins. Co. of London v. Kehoe*, 197 Mass. 354, 83 N. E. 866, 15 L. R. A. [N. S.] 1007, 125 Am. St. Rep. 375, 14 Ann. Cas. 690). If on a change of location the policy is transferred to cover the goods in the new location, the fact that the agent happens to be in the service of a person whose goods are insured in the company which he represents, in another capacity, will not make him the agent of such

person in transferring the insurance, and, upon the removal of the goods insured, to another house, a notice to him by the insured is sufficient to bind the company as its alter ego (*Shutts v. Milwaukee Mechanics' Ins. Co.*, 141 S. W. 15, 159 Mo. App. 436).

In *Hulen v. National Fire Ins. Co. of Hartford, Conn.*, 80 Kan. 127, 102 Pac. 52, the policy covering merchandise provided that it would be in force only while the stock was located at a certain place. The stock was afterwards removed to another location, where the premium rate was higher. The insurer was duly notified of the removal, with the request that the policy be canceled and the unearned premium returned. It replied suggesting that insured see its local agent and have the policy transferred to the new location. Insured thereupon saw the local agent, who orally agreed to transfer the policy, and the unearned premium was retained by the insurer. It was held that the insurer was bound by the act of its agent, and that its failure or that of its agent to notify insured of the higher premium rate and demand payment therefor was a waiver of the higher rate.

In *E. C. Winson & Son v. Mutual Fire & Tornado Ass'n*, 153 N. W. 97, 170 Iowa, 521, it was held that provisions in the by-laws of an insurance association for permission to remove the property from the building in which it was insured and for notice of removal of the owner do not apply where the property was not in a building when insured and was temporarily removed to another state.

1622-1623. (m) Same—Effect of removal

1622 (m). Where insured removed her property in violation of the policy provision that it should be void if the property was removed without the written or printed assent of the insurer, except in case of the removal for preservation from fire, and there was no knowledge of such removal by any officer of the company authorized to assent thereto, it constituted a complete defense to an action on the policy.

Black v. Fidelity-Phenix Fire Ins. Co., 81 S. E. 584, 14 Ga. App. 510;
Lummus v. Fireman's Fund Ins. Co., 83 S. E. 688, 167 N. C. 654,
 L. R. A. 1915D, 239; *Pringle v. Spring Garden Ins. Co.*, 91 N. E.
 209, 205 Mass. 88; *Johnson v. Franklin Ins. Co. of Philadelphia*,
 Pa., 156 Pac. 567, 90 Wash. 631.

But where a fire policy only provided that the company should not be liable beyond three-fourths of the actual cash value of

personal property at the time any loss or damage occurred, the removal of a part of the goods insured from the building before the fire, outside of the usual course of business, was not such a fraud on the insurer as discharged it from liability on the policy (*Beavers v. Security Mut. Ins. Co.*, 90 S. W. 13, 76 Ark. 595, 6 Ann. Cas. 585).

If the local agent agrees to the removal of the insured property and a transfer of the policy, the fact that the rate of insurance is greater at the new location does not release the company from its obligation under the policy, where the insured agrees and holds himself ready to pay the additional insurance (*Cooper v. German-American Ins. Co.*, 104 N. W. 687, 96 Minn. 81).

In *Kinney v. Farmers' Mutual Fire & Ins. Society of Kiron*, Iowa, 141 N. W. 706, 159 Iowa, 490, Ann. Cas. 1915A, 609, it was held that a policy issued by an insurer whose constitution provided that its policies should extend only to live stock on the farm covers insured's live stock when temporarily off his farm for purpose of pasturage; and in *Steil v. Sun Ins. Office of London*, 155 Pac. 72, 171 Cal. 795, a fire policy, insuring goods in a described building and not elsewhere, was held not to cover a loss of goods while outside of the building, and that a removal did not avoid the policy, but merely suspended it.

The sufficiency of the evidence to show fraudulent intent in the removal of goods is considered in *Oehler v. Phoenix Ins. Co. of Hartford, Conn.*, 139 S. W. 1173, 159 Mo. App. 696; *Smith v. Mutual Cash Guaranty Fire Ins. Co.*, 21 S. D. 433, 113 N. W. 94.

1623. (n) Same—Increase of risk

1623 (n). Whether a removal of the property without the insurer's consent increased the risk was a question for the jury, to be determined, not only from expert opinion, but from all the facts, including the location of the several buildings, the material of which they were constructed; the nature and size of other buildings in the vicinity, the facilities for extinguishing fire, and other facts having reasonable tendency to show their relative exposure to fire and the chances of loss therefrom; and the burden of showing an increase of risk is on the defendant (*Adams v. Atlas Mut. Ins. Co.*, 135 Iowa, 299, 112 N. W. 651). Where a policy upon live stock did not provide that it should be void in case the stock was taken from the owner's farm, the owner does not have the burden, under Code Iowa, § 1743, of showing that the placing of the stock upon another farm for pasturage did not enhance the risk (*Kin-*

ney v. Farmers' Mutual Fire & Ins. Society of Kiron, Iowa, 141 N. W. 706, 159 Iowa, 490, Ann. Cas. 1915A, 609).

Evidence that the hazard was less at a new location is admissible, where the insured asserted it was agreed that the goods were covered by the policy after removal, though there was no indorsement on the policy (*Steil v. Sun Ins. Office of London*, 155 Pac. 72, 171 Cal. 795).

**10. CHANGE IN USE OR OCCUPANCY OF INSURED PREMISES
OR PREMISES CONTAINING PERSONAL PROPERTY
INSURED**

**1624-1628. (b) Nature of statements or conditions as to occupancy
or use of building**

1625 (b). The words, "occupied as a saloon," in a policy, are words of description only, and do not mean that the building insured shall be at all times conducted as a saloon (*Silver v. London Assur. Corporation*, 61 Wash. 593, 112 Pac. 666). So, where a policy describes the premises as "occupied for general store purposes," it is not avoided by the fact that at the time of the fire the first floor was used as a general store and the second floor for a lodge room (*Exchange Mut. Fire Ins. Co. v. Consolidated Mut. Fire Ins. Co.*, 46 Pa. Super. Ct. 601).

In *Connecticut Fire Ins. Co. v. Buchanan*, 141 Fed. 877, 73 C. C. A. 111, 4 L. R. A. (N. S.) 758, it appeared that one policy insured a building as a normal school and dwelling, and the other insured it only while occupied as a normal school and dwelling, and both policies provided that if the occupants should be changed, except without increase of hazard, or if the use be changed, it should be held to be an election on the part of the insured to cancel the policy, and that the entire policy should be void if the building become vacant or unoccupied. It was held that both policies plainly contemplated use and occupancy as a normal school and dwelling and make the same a condition to the acceptance and continuance of the risk.

1626 (b). In *Harris v. North American Ins. Co.*, 190 Mass. 361, 77 N. E. 493, 4 L. R. A. (N. S.) 1137, the defendant insured a building in process of erection, designated as a dwelling house. The plaintiff notified the agent who wrote the policy of the condition of the house, and that it was not to be occupied until fully completed. It was held, that such representations being material as provided by the Revised Laws Mass. c. 118, § 21, were incorporated in the

policy, though not expressed therein, and all that plaintiff undertook to perform thereunder was that, when occupied, the building should be used for the purpose of a dwelling. So the condition of insured manufacturing property as to occupancy and operation at the time of loss by fire, being the same as when the policy was written and delivered, recovery thereon cannot be defeated by policy clauses against vacancy of the property or nonoperating of the plant (*Gump v. National Union Fire Ins. Co.*, 34 Ohio Cir. Ct. R. 36, judgment affirmed *National Union Fire Ins. Co. v. Gump*, 99 N. E. 1130, 86 Ohio St. 325).

1628-1629. (c) What constitutes a change of occupants

1628 (c). A policy, insuring against loss of property by theft while in a building occupied by the insured, which stipulates that it shall be void if the conditions or circumstances of the risk are changed without the written consent of the insurer, and if the premises are left without an occupant for more than six consecutive months unless a written permit is indorsed on the policy, authorizes the insured to leave the premises vacant for a period not exceeding six months without the consent of the insurer, or to lease them to tenants not of a character endangering the risk for a term not exceeding six months (*Thomson v. United States Fidelity & Guaranty Co.*, 44 Wash. 388, 87 Pac. 486).

A provision, in a so-called union mortgage clause, that the mortgagee should notify the insurer of a change in occupancy is not violated by failing to notify the insurer of the owner's neglect to occupy the house when completed (*Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co.* [Tex. Civ. App.] 167 S. W. 816).

1634. (g) Effect of change of occupants

1634 (g). Rev. St. Me. 1883, c. 49, declaring that a change in the occupation of the property should not affect a policy of insurance, unless it materially increase the risk, was expressly repealed by Laws 1895, p. 19, c. 18, § 3, providing that all laws inconsistent with the terms of the standard policy provided by the act should be thereby repealed (*Knowlton v. Patrons' Androscoggin Fire Ins. Co.*, 62 Atl. 289, 100 Me. 481, 2 L. R. A. [N. S.] 517).

Where premises were insured as a private dwelling, insured's failure to continue using them as such and his renting of the property avoided the policy (*Planters' Fire Ins. Co. of Little Rock v. Steele*, 178 S. W. 910, 119 Ark. 597, Ann. Cas. 1917B, 667). However, a fire policy on a building "while occupied as Park Terrace

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Sanitarium" does not warrant such use to continue; a clause allowing vacancy for ten days, and another contemplating change of occupancy, except to one more hazardous (*Southern Nat. Ins. Co. v. Cobb* [Tex. Civ. App.] 180 S. W. 155).

1634-1635. (h) Effect of change in use

1634 (h). A change in the use and occupation of insured premises will of course avoid a policy where it is so stipulated (*Cone v. Century Fire Ins. Co.*, 139 Iowa, 205, 117 N. W. 307).

1635 (h). Under a policy providing that it should be payable to the mortgagee, and that no act or default of any person, other than such mortgagee, should affect his right to recover in case of loss, the mortgagee's rights are not affected by a provision that the building shall be occupied as a dwelling and a school, where the building was not so used (*Moore v. Sun Ins. Office*, 111 N. W. 260, 100 Minn. 374).

1636-1637. (i) Same—As dependent on increase of risk

1636 (i). Where an insurance policy describes the premises as a frame building "occupied for general store purposes," the policy is not avoided by the fact that at the time of a fire destroying it it was used "first floor, general store, second floor, lodge," where there is no warranty in the policy as to future or continued use in the same manner as when insured; and this is particularly so where the policy contains a provision that it shall be void, "if the hazard be increased by any means within the control or knowledge of the insured," and there is no evidence that the hazard was increased by the use of the second floor as a lodge room (*Exchange Mut. Fire Ins. Co. v. Consolidated Mut. Fire Ins. Co.*, 46 Pa. Super. Ct. 601).

A fire policy conditioned to become void if the hazard be increased by any means within the control of the insured, issued on a woolen mill, becomes void when the property is used exclusively for the manufacture of cotton bats; the cotton being as inflammable as gunpowder (*Progress Spinning & Knitting Mills Co. v. Southern Nat. Ins. Co.*, 130 Pac. 63, 42 Utah, 263, 45 L. R. A. [N. S.] 122).

1637-1639. (j) Same—What constitutes increase of risk

1638 (j). It is reasonable for an insurance company to exact an obligation from insured that he shall not allow or permit a change to be made in the structure, nature, or habitual use of the insured property materially different from that which the insurer has

agreed to undertake, but trivial or temporary variations in the risk incident to the ordinary use of the property are presupposed by the contracting parties to be likely to occur, and it must be presumed that insurance is made with reference to the character of the property insured and to the owner's use of it in the ordinary way, and for the purpose for which such property is ordinarily held and used, or to cover risks incident to such use (*Siemers v. Meeme Mut. Home Protection Ins. Co.*, 143 Wis. 114, 126 N. W. 669, 139 Am. St. Rep. 1083). Thus, where a policy insures a farm barn without limitations on its use, the company cannot defeat recovery for loss by asserting that the storing of tobacco therein was an increased hazard under a stipulation making the policy void if the risk was made more hazardous, since the storing of tobacco was one of the uses for which barns are ordinarily used (*Hartford Fire Ins. Co. v. Chenault*, 126 S. W. 1098, 137 Ky. 753).

1639-1640. (k) Same—Acts of third persons and changes not under control of insured

1639 (k). Under a clause of a policy prohibiting change of occupant unless without increase of hazard, the storing of tobacco in the barn insured by one other than the owner cannot defeat recovery (*Hartford Fire Ins. Co. v. Chenault*, 126 S. W. 1098, 137 Ky. 753).

1640 (k). Under the provision of an insurance policy that it shall be void if the hazard be increased by any means in the control or knowledge of insured, the policy is not avoided by insured's tenant using the premises, without insured's knowledge, otherwise than allowed by the lease (*North British Mercantile Ins. Co. v. Union Stockyards Co.*, 87 S. W. 285, 27 Ky. Law Rep. 852, 120 Ky. 465).

1640-1642. (l) Same—Temporary change in use and relation to cause of loss

1640 (l). It was no defense to an action on a policy insuring a schoolhouse that prior to the fire one of the school trustees, who had charge of the schoolhouse, stored certain baled hay therein, and that certain raftsmen occupied the schoolhouse at night, neither of which was shown to have had any relation to the fire (*Mississippi Home Ins. Co. v. Stevens*, 93 Miss. 439, 46 South. 245).

1641 (l). In *Sumter Tobacco Warehouse Co. v. Phoenix Assur. Co.*, 76 S. C. 76, 56 S. E. 654, 10 L. R. A. (N. S.) 736, 121 Am. St.

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Rep. 941, 11 Ann. Cas. 780, the policy provided that an increased hazard within the knowledge of the insured would avoid the policy. The owner of the building insured rented to a tenant a portion thereof to be used for a business more hazardous than contemplated by the policy. It was held that this did not avoid the policy, where the temporary hazard ended without loss and the loss occurred from another source.

1642-1645. (m) Illegal use of property insured

1643 (m). Whether there was an increase of hazard avoiding a policy on personal property "while * * * in the * * * building * * * while occupied as a saloon and dwelling house" is a question for the jury, though after the year in which insured might engage in the retail liquor business he paid no license tax for such a business, and there was conflicting evidence that he thereafter conducted such business contrary to law (*Miller v. Prussian Nat. Ins. Co.*, 122 N. W. 1093, 158 Mich. 402).

1645-1646. (n) Operation of mill or factory at night

1645 (n). Where the subject of insurance is a manufacturing establishment for the slaughter of live stock and the manufacture and cure of meat products, and the plant contains refrigerating appliances and electric light apparatus, a stipulation in the policy that the plant is not to be operated in whole or in part at night later than 10 o'clock is not to be construed as prohibiting the running of the electric light and cold storage plant after the hour named, as it was not contemplated that the product of the plant should be spoiled from lack of refrigeration, or that there should not be any light about the premises after 10 o'clock or that all steam should be withdrawn from the boiler or all smoke blown out of the smokehouse before 10 o'clock (*Mellon v. Ohio German Fire Ins. Co.*, 40 Pa. Super. Ct. 623).

1646-1648. (o) Suspension of business carried on within the building

1646 (o). A provision of a fire policy that if the property be idle or shut down for more than 30 days at any one time notice must be given to the company, and permission to remain idle for such time must be indorsed on the policy or it should immediately cease and determine, was not objectionable for unreasonableness (*Kentucky Vermillion Mining & Concentrating Co. v. Norwich Fire Ins. Soc.*,

146 Fed. 695, 77 C. C. A. 121). The breach of such a condition will, in general, forfeit the policy.

Brehm Lumber Co. v. Svea Ins. Co., 79 Pac. 34, 36 Wash. 520, 68 L. R. A. 109; *Kentucky Vermillion Mining & Concentrating Co. v. Norwich Union Fire Ins. Soc.*, 146 Fed. 695, 77 C. C. A. 121.

In *Capital Fire Ins. Co. v. Carroll*, 26 Okl. 286, 109 Pac. 535, a policy covering a mill plant for the manufacture of flour and other feed products stipulated that the entire policy should be void if the manufacturing establishment ceased to be operated for more than 10 consecutive days. The mill was not operated for the manufacture of flour when the policy was issued and for a longer period than 10 days thereafter, but was, at the issuance of the policy and afterward until the property was destroyed, operated in the manufacture of meal, bran, and other feed products. It was held that the establishment had not ceased operation within the meaning of the policy.

1647 (o). In *Home Ins. Co. v. North Little Rock Ice & Electric Co.*, 86 Ark. 538, 111 S. W. 994, 23 L. R. A. (N. S.) 1201, the defendant had insured an ice manufacturing plant after its operation had been abandoned, the policy describing the property as a building "occupied as an ice factory," and described the personal property as appurtenances and appliances necessary to be used in plaintiff's business, all while contained in such building. The policy also declared that if the subject of insurance was a manufacturing establishment, and it should cease to be operated for more than 10 consecutive days without the insurer's consent, the policy should be forfeited. It was held that the policy being construed most strictly against the insurer did not insure an ice manufacturing plant in operation, but merely a building and appliances therein that had been used for that purpose, and that the policy was therefore not forfeited by a continued failure to operate the plant without insurer's consent.

1649-1652. (q) Questions of practice

1649 (q). Where the policy provided that it should be void if insured made any change in interest, title, or possession (except change of occupancy without increase of hazard), defendant cannot claim a change of occupancy increased the hazard without pleading the clause (*Silver v. London Assur. Corporation*, 61 Wash. 593, 112 Pac. 666). Where the policy covered a certain building while occupied for a specified purpose, a pleading setting up a different use

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of the building is demurrable, unless it denies that the building was occupied for the purposes specified in the policy at or about the time of the fire (*Southern Home Ins. Co. v. Murphy*, 57 Fla. 191, 49 South. 537).

1650 (q). Whether there was an increase of hazard by the alleged illegal use of the building containing personal property insured is a question for the jury (*Miller v. Prussian Nat. Ins. Co.*, 158 Mich. 402, 122 N. W. 1093). And generally the burden is on the insurer to show that the risk was increased by change of occupants or in the use of the building.

Seaman v. Anchor Fire Ins. Co., 149 Iowa, 583, 128 N. W. 934; *Silver v. London Assur. Corp.*, 61 Wash. 598, 112 Pac. 606.

The sufficiency of the evidence to show breach of the condition as to use and occupancy is considered in *Connecticut Fire Ins. Co. v. Buchanan*, 141 Fed. 877, 73 C. C. A. 111, 4 L. R. A. (N. S.) 758. Whether the evidence raised an issue as to breach of warranty as to occupancy was considered in *Agricultural Ins. Co. v. Owens*, 63 Tex. Civ. App. 354, 132 S. W. 828.

11. VACANCY OF PREMISES AS GROUND OF FORFEITURE

1652-1655. (a) In general

1654 (a). A stipulation that the policy shall be void if the building becomes vacant is material (*Farmers' & Merchants' Ins. Co. v. Bodge*, 76 Neb. 31, 110 N. W. 1018 reversing on rehearing 76 Neb. 31, 106 N. W. 1004), and is one that the parties may lawfully make (*Patterson v. American Ins. Co. of Newark*, 164 Mo. App. 157, 148 S. W. 448).

1655-1657. (b) Construction of condition

1655 (b). In *Home Ins. Co. v. Gagen*, 38 Ind. App. 680, 76 N. E. 927, the policy stipulated that if the "premises" described should become vacant the policy should be void. The property insured was a barn on a farm referred to in the policy as being owned by the assured. The contract was made on a form containing blanks adapted to many kinds of property, such as "farm implements * * * on the premises," "grain * * * on the premises," etc. The policy provided that it should not be construed to cover property located elsewhere than on the "premises" or in the buildings described. It was held that the provision that the policy should be void if the premises should become vacant had reference to the occupancy of the farm, the word "premises" meaning the farm, and

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the fact that the barn had never had anything in it did not defeat a recovery for its loss.

1656 (b). The condition is applicable and material in policies against loss by tornado or windstorm (*Farmers' & Merchants' Ins. Co. v. Bodge*, 76 Neb. 31, 110 N. W. 1018, reversing on rehearing 76 Neb. 31, 106 N. W. 1004).

1657 (b). The provision that the policy shall become void if the building insured "be or become vacant or unoccupied and so remain for ten days" means the 10 days next ensuing after the end of the term of the policy, and does not mean that the company shall be liable during the 10 days after the expiration of any vacancy permit period (*Emery v. Lord*, 29 App. D. C. 589). In accordance with the general rule as to construction of contracts, if the provisions of a standard policy as to the effect of the vacancy of the insured premises for 30 days are modified by a rider attached to the policy under the authority given by Rev. St. c. 49, § 4, stipulating that a policy should be rendered void for vacancy continued for more than 10 days, the contract as shown by the rider governs (*Knowlton v. Patrons' Androscoggin Mut. Fire Ins. Co.*, 62 Atl. 289, 100 Me. 481, 2 L. R. A. [N. S.] 517). Provisions of a policy of a mutual company, that it will not pay any loss on a dwelling when vacant more than 10 days, is not inconsistent with a by-law that vacation of the property for more than 10 days shall suspend the policy, but it shall revive on reoccupation, provided the owner notify the company's secretary of the reoccupation (*Brashears v. Perry County Farmers' Protective Ins. Co.*, 51 Ind. App. 8, 98 N. E. 889).

A policy, insuring against loss of property by theft while in a building occupied by the insured, which stipulates that it shall be void if the conditions or circumstances of the risk are changed without the written consent of the insurer, and if the premises are left without an occupant for more than six consecutive months unless a written permit is indorsed on the policy, authorizes the insured to leave the premises vacant for a period not exceeding six months without the consent of the insurer (*Thompson v. United States Fidelity & Guaranty Co.*, 44 Wash. 388, 87 Pac. 486).

1657-1659. (c) Notice of vacancy and consent thereto in general

1658 (c). Under a clause in a fire policy that, if a building becomes and remains vacant for five days, the policy shall become void, unless continued by consent of the insurer, and that the owner, in case the building becomes vacant, shall report it to the in-

surer at its home office within five days, and as often as every 10 days thereafter during the vacancy, notice of vacancy is only to be given when no permit for vacancy has been issued, which construction is strengthened by permits issued, granting the right for vacancy for 30 and 60 days, respectively, without prejudice to insured, except that during the vacancies the amount of insurance is reduced one-third, saying nothing as to notice, and by the fact that, though no reports were made by insured during the time of the first permit, the second permit was issued without objection (*National Mut. Fire Ins. Co. v. Duncan*, 44 Colo. 472, 98 Pac. 634, 20 L. R. A. [N. S.] 340). Where an application for a policy stated that the premises were vacant, that they remained vacant, and no extra premium was paid for vacancy, nor a vacancy permit attached to the policy, does not avoid liability of the insurer.

Law v. Home Mut. Fire Ins. Co., 56 Pa. Super. Ct. 527; *Maxwell v. York Mut. Fire Ins. Co.*, 96 Atl. 877, 114 Me. 170.

A vacancy permit will be valid even though not attached to the policy, especially where it was not the practice of the agent to physically attach them unless the policies were tendered at the time (*Emery v. Lord*, 29 App. D. C. 589).

1662-1666. (e) What constitutes vacancy or nonoccupancy—General principles

1663 (e). As commonly used and understood, the word "occupation" is synonymous with "possession," but as used in a fire policy, providing that it shall become void if the house insured becomes unoccupied, means that no one lives therein. It is not synonymous with vacant, but is that condition where no one has the actual use or possession of the thing or property in question. In such constructions the word is to be construed with reference to the nature and character of the building, the purpose for which it is designed, and the uses contemplated by the parties as expressed in the contract (*Yost v. Anchor Fire Ins. Co.*, 38 Pa. Super. Ct. 594). In *Washington Fire Ins. Co. v. Cobb* (Tex. Civ. App.) 163 S. W. 608, it was held that the term "occupied" as used in a fire policy, implies an actual use by some person according to the purpose for which it is designed, and does not imply that some one shall remain in the building all of the time without interruption, but merely that there shall not be a cessation of occupancy for any considerable length of time.

But see *Cone v. Century Fire Ins. Co.*, 139 Iowa, 205, 117 N. W. 307, holding that an answer alleging that the premises became unoc-

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cuped was sufficient to raise the question of a vacancy; the terms "vacancy" and "nonoccupancy" being equivalent in meaning.

It has also been held that "vacant," in a fire policy, means empty, while cessation of "occupancy" means change of use. *Southern Nat. Ins. Co. v. Cobb* (Tex. Civ. App.) 180 S. W. 155.

A policy of fire insurance in the standard form permits occasional or incidental vacancies for less than ten days (*Tracy v. Queen City Fire Ins. Co.*, 61 South. 687, 132 La. 610, Ann. Cas. 1914D, 1145).

After a partial loss rendering the building untenable, the insured is not guilty of a breach of the vacancy clause of the policy because he permits the property to remain unoccupied with the insurer's knowledge (*Schmidt v. Williamsburg City Fire Ins. Co.* of Brooklyn, N. Y., 98 Neb. 61, 151 N. W. 920).

In *Kupfersmith v. Delaware Ins. Co.*, 84 N. J. Law, 271, 86 Atl. 399, 45 L. R. A. (N. S.) 847, Ann. Cas. 1914E, 1172, it was held that a clause in an insurance policy that liability of insurer shall cease if building becomes vacant or unoccupied for ten days is applicable where the building becomes vacant by reason of fire.

1666-1670. (f) Same—Dwellings

1666 (f). Where a policy on a dwelling house in process of construction was condition against vacancy, and permission was given for mechanics to work in and about the premises 30 days after date, the building, never having been occupied as a dwelling house, was not "vacant and unoccupied" after the expiration of such permits (*Harris v. North American Ins. Co.*, 77 N. E. 493, 190 Mass. 361, 4 L. R. A. [N. S.] 1137).

1667 (f). The occupancy of a dwelling house means that some person is living in it, and, if for 10 days no person is living in it, the house is unoccupied, and the policy is forfeited, but one may occupy premises which are not places of abode, and a house occupied by a caretaker or watchman not making the house his domicile is occupied (*Walton v. Phoenix Ins. Co.*, 162 Mo. App. 316, 141 S. W. 1138).

1668 (f). Where the husband of a tenant of a building and a hired man slept in the building after the tenant had removed the greater part of the furniture, but leaving a part, and the husband left his horses and chickens, the house was not vacant or unoccupied within a fire policy (*Seubert v. Fidelity-Phoenix Ins. Co.* of New York, 29 S. D. 261, 136 N. W. 103, 40 L. R. A. [N. S.] 58).

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1669 (f). Within a by-law of a mutual insurance company as to vacation of the house suspending the policy, to be revived by re-occupation, with notice, "vacant" meant the same as unoccupied; and the leaving of some furniture in the house will not save it from being vacant (*Brashears v. Perry County Farmers' Protective Ins. Co.*, 51 Ind. App. 8, 98 N. E. 889).

In *Robinson v. Mennonite Mut. Fire Ins. Co.*, 139 Pac. 420, 91 Kan. 850, it was held that the condition of a fire insurance policy, that if the building should remain vacant for 30 days the policy should be void unless a vacancy permit was secured, contemplated that some individual should be in such charge of the premises as would naturally result in protection against fire; and it was stated that within the terms of the policy, a dwelling house may not be "vacant" although not actually occupied as a present place of abode, and may be "vacant" though far from empty of everything but air.

1670-1672. (g) Same—Buildings other than dwellings

1671 (g). Where a policy on a building occupied as a saloon, contained the usual condition against vacancy, but did not state that the building should be devoted to saloon purposes, the occupancy may be by a watchman acting under a sheriff under legal process (*Silver v. London Assur. Corp.*, 61 Wash. 593, 112 Pac. 666).

1672-1675. (h) Temporary absence of occupant

1673 (h). A condition in a policy authorizing a forfeiture in case the property shall become vacant by the removal of the owner or occupant should be construed to mean a permanent removal and entire abandonment of the house by insured (*Harris v. North American Ins. Co.*, 77 N. E. 493, 190 Mass. 361, 4 L. R. A. [N. S.] 1137). Hence a mere temporary absence of the occupants of a dwelling house, with the intention to return, when the premises are left in their usual condition, does not make the house "vacant," within the condition.

Athens Mut. Ins. Co. v. Toney, 1 Ga. App. 492, 57 S. E. 1013; *Kampen v. Farmers' Mut. Fire Ins. Co.*, 116 Minn. 68, 133 N. W. 163; *President, etc., of Ins. Co. of North America v. Pitts*, 88 Miss. 587, 41 South. 5, 7 L. R. A. (N. S.) 627, 117 Am. St. Rep. 756, 9 Ann. Cas. 54; *Silver v. London Assur. Corporation*, 61 Wash. 593, 112 Pac. 666. But see *Hardiman v. Fire Ass'n of Philadelphia*, 212 Pa. 383, 61 Atl. 990; *Westchester Fire Ins. Co. v. Redditt* (Tex. Civ. App.)

VACANCY OF PREMISES AS GROUND OF FORFEITURE 1675-1677

196 S. W. 334; Walrod v. Des Moines Fire Ins. Co., 159 Iowa, 121, 140 N. W. 218.

In Gash v. Home Ins. Co., 153 Ill. App. 31, a house insured by the owner was leased and occupied by the tenant and his family. The house was located on land subject to overflow, and about the 1st of the month in which the fire occurred the water overflowed the land on which the house was located and rose to the windows of the house, compelling the tenant to move his family to another house, together with some of his household goods, the remainder of which he placed on a scaffold in the house. After the waters receded and about two days before the fire occurred, the tenant took down the scaffolding, cleaned the house, and built a fire to dry it out preparatory to moving his family back, and the house was burned before the tenant and his family re-entered the house. It was held that the enforced absence of the tenant was not a breach of the condition. On the other hand, in Norris v. Connecticut Fire Ins. Co., 115 Md. 174, 80 Atl. 960, Ann. Cas. 1912D, 79, the policy provided that it should be void if the building described became vacant or unoccupied, and remained so for 10 days. Insured removed from her dwelling house to a city on June 18th with her family, and did not return until July 6th; the house being destroyed by fire in the meantime. All or a greater part of plaintiff's furniture was removed from the house, and she and her family resided in the city during such period, except her husband, who occasionally visited the place where the insured house was, and insured, when she returned to the neighborhood, did not occupy it, but lived with her mother. It was held that the policy was forfeited under the provision against vacancy.

1675-1677. (1) Temporary vacancy incident to change of tenants

1675 (i). It is a well-established rule that a temporary vacancy caused by or incident to a change of tenants is not within the condition. Thus, where, after the tenant of an insured house moved out, another person moved in at the request of the owner, so as to preserve the insurance, had all his effects in the house, with control of the premises, and was corporally present and in actual possession of the premises every night during most of the time between departure of the tenant and the destruction of the house by fire, which was about a month, and was not absent from the place during that time for more than four days, the house was occupied, within a provision of the policy that the insurance should only con-

tinue while the premises were occupied by a tenant as a private dwelling house, and that the entire policy, unless otherwise provided, should be void if the building, whether intended for occupancy by the owner or tenant, should remain vacant or unoccupied for 10 days, and the fact that only one of the rooms in the house had been used by the occupant, and that the other rooms were not furnished, did not render the house vacant within the policy; the word "vacant" meaning "empty" in its ordinary sense (*Agricultural Ins. Co. of Watertown, N. Y., v. Owens*, 63 Tex. Civ. App. 354, 132 S. W. 828). So, too, where plaintiff's husband, who lived in another house on the same lot, placed a bed in the insured house after the tenant vacated, and slept there five nights each week, carrying on his business on the premises during the day, the house was not "vacant and unoccupied for ten days" within the forfeiture clause of the insurance policy (*Thieme v. Niagara Fire Ins. Co.*, 91 N. Y. Supp. 499, 100 App. Div. 278, affirmed 78 N. E. 1113, 185 N. Y. 576); and in *Farmers' Mut. Equity Ins. Society v. Smith*, 165 S. W. 675, 158 Ky. 459, L. R. A. 1915B, 844, insurer was held liable where tenant moved out on Saturday evening and another tenant was to move in on Monday, and the building was burned early Monday morning. So, in *Covey v. National Union Fire Ins. Co. of Pittsburgh*, 161 Pac. 35, 31 Cal. App. 579, where a tenant had removed all but a few of his articles, which he intended to return and get, but still held the key, such facts were not conclusive against his occupancy, so as to avoid a fire policy terminating liability on vacancies.

A fire policy stipulated that it should be void if the building insured should become vacant or unoccupied, unless otherwise provided by agreement indorsed thereon. At the time of the issuance of the policy the building was, with the knowledge of the insurer, occupied by a tenant. The building continued to be occupied by the tenant until 5 o'clock p. m. on the day the same was destroyed. The tenant, without the knowledge of the assured, removed therefrom; and four hours after the removal, and before the assured had learned of it or had had opportunity to learn of it, and before he had a reasonable time to make application for a vacancy permit, and before he had opportunity to procure another tenant, the building was destroyed by fire. The Indiana Appellate Court held in *Ohio Farmers' Ins. Co. v. Vogel* (Ind. App.) 73 N. E. 612, that the building was vacant within the condition at the time of the fire and the policy void. A petition for rehearing was overruled ([Ind.

App.] 75 N. E. 849). On transfer to the Supreme Court, however, that court held that the removal of the tenant without the knowledge of the insured four hours before the fire did not render the policy void (*Ohio Farmers' Ins. Co. v. Vogel*, 76 N. E. 977, 166 Ind. 239, 3 L. R. A. [N. S.] 966, 117 Am. St. Rep. 382, 9 Ann. Cas. 91).

On the other hand, in *Knowlton v. Patrons' Androscoggin Mut. Fire Ins. Co.*, 100 Me. 481, 62 Atl. 289, 2 L. R. A. (N. S.) 517, it appeared that the owner of certain farm buildings insured the same, the house thereon being occupied by a tenant. The tenant moved out on the 4th day of April, but he continued to pay rent up to the 19th of April, when the property was destroyed by fire, and continued to work on the farm pleasant days. During his absence therefrom the stock was cared for by a neighbor. It was held that the plaintiff's buildings insured were "personally unoccupied" without the consent of the company for more than 10 days immediately preceding their destruction within the terms of a policy providing that such nonoccupancy should render the policy void.

1678-1681. (k) Effect of breach of condition

1679 (k). Where the policy contains the usual condition declaring it void if the premises become vacant or unoccupied, a breach of the condition existing at the time of the loss forfeits the policy.

Wheeler v. Farmers' Fire Ins. Co., 161 Ill. App. 585; *Patterson v. American Ins. Co. of Newark*, 148 S. W. 448, 164 Mo. App. 157; *Farmers' & Merchants' Ins. Co. v. Bodge*, 76 Neb. 31, 110 N. W. 1018, reversing on rehearing 76 Neb. 31, 106 N. W. 1004; *Germania Fire Ins. Co. v. Werner*, 76 Ohio St. 543, 81 N. E. 980, 12 L. R. A. (N. S.) 456, 118 Am. St. Rep. 891; *Silver v. London Assur. Corporation*, 61 Wash. 593, 112 Pac. 666.

In *Porter v. Insurance Co. of North America*, 29 Pa. Super. Ct. 75, the insured requested the agent of the insurance company to issue a new policy on the ground of a change of ownership. The agent, instead of issuing a new policy, indorsed a new contract of insurance on the old policy, naming the new beneficiary individually, and not as trustee, as he had been informed and notified by the parties. It was held that the company could not in an action upon the policy defend, because of a nonoccupancy of the insured premises which had occurred prior to the new contract.

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1680 (k). It appears to be the better rule that a vacancy merely suspends the policy, and if the premises are reoccupied before the loss liability under the policy again attaches.

Athens Mut. Ins. Co. v. Toney, 1 Ga. App. 492, 57 S. E. 1013; President, etc., of Ins. Co. of North America v. Pitts, 88 Miss. 587, 41 South. 5, 7 L. R. A. (N. S.) 627, 117 Am. St. Rep. 756, 9 Ann. Cas. 54; Silver v. London Assur. Corporation, 61 Wash. 593, 112 Pac. 666. But see Hardiman v. Fire Ass'n of Philadelphia, 212 Pa. 383, 61 Atl. 990; Beecher v. Vermont Mut. Fire Ins. Co., 90 Vt. 347, 98 Atl. 917.

It has been held, however, that a temporary vacancy of property insured as a private dwelling and thereafter rented out precludes a recovery on a fire policy (Planters' Fire Ins. Co. of Little Rock v. Steele, 119 Ark. 597, 178 S. W. 910, Ann. Cas. 1917B, 667). And in Dolliver v. Granite State Fire Ins. Co., 89 Atl. 8, 111 Me. 275, 50 L. R. A. (N. S.) 1106, Ann. Cas. 1916C, 765, the same result was reached under statute.

1681-1683. (l) Same—As dependent on increase of risk

1681 (l). Under standard policy as prescribed by Laws Me. 1895, p. 14, c. 18, providing that if the premises become vacant by the removal of the owner or the occupant the policy shall be void, the question of material increase of the risk from vacancy or nonoccupancy is not open to question (Knowlton v. Patrons' Androscoggin Mut. Fire Ins. Co., 62 Atl. 289, 100 Me. 481, 2 L. R. A. [N. S.] 517).

1685. (n) Questions of practice

1685 (n). The nonobservance by the assured of the provision in a policy, declaring that it shall be void on the premises becoming vacant, is a matter of defense which, in order to be available, must be specially pleaded.

Liverpool & London & Globe Ins. Co. v. Cargill, 44 Okl. 735, 145 Pac. 1134; Home Ins. Co. v. Gagen, 76 N. E. 927, 38 Ind. App. 680.

An answer alleging that the possession and occupancy of the buildings described and of the insured premises was changed, and said premises ceased to be occupied as provided in the policy, is sufficient to raise the question of a vacancy, for the terms "vacancy" and "nonoccupancy" are used interchangeably and are equivalent in meaning (Cone v. Century Fire Ins. Co., 139 Iowa, 205, 117 N. W. 307).

A charge that the jury need not consider whether or not the property was vacant at the time the policy was applied for and issued is not erroneous under the provisions of Rev. St. § 3643, providing for examination by the insurer's agent of a building to be insured, particularly when the evidence is undisputed that the agent of the company had knowledge of such vacancy (*German-American Ins. Co. v. McBee*, 31 Ohio Cir. Ct. R. 469).

1685-1686. (o) Same—Evidence

1685 (o). A fire insurance company relying on the forfeiture of a policy on the ground that the dwelling insured has become vacant or unoccupied in violation of the policy has the burden of establishing the facts.

Harris v. North American Ins. Co., 77 N. E. 493, 190 Mass. 361, 4 L. R. A. (N. S.) 1137; *Walton v. Phoenix Ins. Co.*, 162 Mo. App. 316, 141 S. W. 1138.

The sufficiency of the evidence to show a breach of the condition as to vacancy is considered in *Kampen v. Farmers' Mut. Fire Ins. Co.*, 116 Minn. 68, 133 N. W. 163; *Walton v. Phoenix Ins. Co.*, 141 S. W. 1138, 162 Mo. App. 316; *Johnson v. Mennonite Mut. Fire Ins. Co.*, 100 Kan. 53, 163 Pac. 1074; *Johnson v. Mennonite Mut. Fire Ins. Co.*, 100 Kan. 450, 165 Pac. 275.

1686-1687. (p) Same—Questions for jury

1686 (p). The meaning of the terms "vacant, unoccupied, or uninhabited" in a provision in a fire insurance policy rendering the policy void if the building should be in that condition, is a question of law (*Gash v. Home Ins. Co. of New York*, 153 Ill. App. 31); but whether the premises were in fact vacant or unoccupied is a question for the jury.

Gash v. Home Ins. Co., 153 Ill. App. 31; *Cone v. Century Fire Ins. Co.*, 139 Iowa, 205, 117 N. W. 307; *Maas v. Anchor Fire Ins. Co.*, 111 N. W. 1044, 148 Mich. 432; *Roach v. Aetna Ins. Co.*, 121 N. W. 613, 108 Minn. 127.

In *Yost v. Anchor Fire Ins. Co.*, 38 Pa. Super. Ct. 594, the policy, which covered a summer hotel had incorporated in it the following clause: "Permission granted to remain unoccupied during winter months, it being understood, however, that when so unoccupied, a competent person shall be in charge." It was closed on September 1st, after which time it was occupied by a competent watchman or caretaker with his family, until a fire destroyed it on September 29th. The insurance company claimed that, Septem-

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ber not being a calendar winter month, the provision that the policy should be void "if the premises are unoccupied and so remain for ten days" was operative. It was held that it was for the jury to say under all the circumstances of the case whether the fire occurred during a winter month within the meaning of the policy.

1687 (p). Whether allowing the house insured to remain vacant after mechanics had left it increased the hazard, within a condition of the policy, was a question of fact for the jury (*Harris v. North American Ins. Co.*, 77 N. E. 493, 190 Mass. 361, 4 L. R. A. [N. S.] 1137). Whether plaintiff addressed and mailed to defendant a request for a vacancy permit three weeks before the fire was for the jury (*Patterson v. American Ins. Co. of New-ark, N. J.* [Mo. App.] 186 S. W. 552).

In action on insurance policy, where defendant pleaded unauthorized vacancy and the uncontradicted evidence showed permit from defendant, the court properly refused to submit to the jury the question whether the building was unoccupied for full 10 days before the fire (*German-American Ins. Co. v. Shaddix* [Tex. Civ. App.] 194 S. W. 1178).

12. KEEPING AND USE OF PROHIBITED ARTICLES AS GROUND OF FORFEITURE

1688-1692. (b) Construction of condition

1691 (b). A policy providing that kerosene oil might be used for light and kept for sale but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or 10 feet from artificial light, did not prohibit its use in heaters, and such use did not avoid the policy, there being no question as to the standard of the oil or drawing and filling (*Phoenix Ins. Co. of Hartford v. Fleenor*, 104 Ark. 119, 148 S. W. 650).

Where a lessee of one floor was insured against loss by fire of its furnishings on that floor, and a clause in the policy provided that it should be void if moving picture celluloid films were kept "in the above-described premises," the word "premises" did not include other parts of the building over which it had no control (*Central Market Street Co. v. North British & Mercantile Ins. Co. of London and Edinburgh*, 91 Atl. 662, 245 Pa. 272).

1692-1694. (c) Same—As to articles prohibited

1693 (c). Blasting powder, although it may be a less dangerous explosive than dynamite or gunpowder, is none the less included in the words, "or other explosives," as used in a condition avoiding a policy of fire insurance if there be kept, used, or allowed on the premises, benzine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder, naphtha, nitroglycerine, or other explosives (*Penman v. St. Paul Fire & Marine Ins. Co.*, 30 Sup. Ct. 312, 216 U. S. 311, 54 L. Ed. 493, affirming 151 Fed. 961, 81 C. C. A. 151).

Several machines, each with gasoline in its tank, are allowed on the insured premises, by the warranty in the rider, construed, under Civ. Code, § 1654, in favor of insured; it prohibiting gasoline on the premises other than in the reservoirs of "machines" admitted into the building where "the machine is permanently or temporarily stabled" (*O'Neill v. Caledonian Ins. Co.*, 166 Cal. 310, 135 Pac. 1121).

1696-1698. (e) What constitutes a breach of condition

1697 (e). A condition in a fire policy rendering it void in case fireworks should be "kept, used, or allowed" on the premises was violated by the taking of fireworks on the premises, and there setting them off for the purpose of an exhibition (*Westchester Fire Ins. Co. v. Ocean View Pleasure Pier Co.*, 56 S. E. 584, 106 Va. 633).

1698-1700. (f) Same—Temporary or incidental keeping or use

1699 (f). The temporary presence in a house of a half pint of gasoline in a bottle securely corked which was not the cause of a fire was not sufficient to avoid the policy of insurance, although it contained a provision against keeping gasoline on the premises (*Arnold v. American Ins. Co.*, 84 Pac. 182, 148 Cal. 660, 25 L. R. A. [N. S.] 6). So keeping gasoline in a pint bottle on a shelf near a gasoline engine to start it, the main quantity of gasoline being contained in a can in a separate building, is a keeping in small quantity and for incidental use, and not a violation of a policy inhibition against keeping gasoline on the premises (*Gump v. National Union Fire Ins. Co.*, 34 Ohio Cir. Ct. R. 36, affirmed *National Union Fire Ins. Co. v. Gump*, 99 N. E. 1130, 86 Ohio St. 325). Similarly, having it there merely for temporary use in cleaning an auto or vulcanizing the tires does not void the policy (*Home Ins. Co. of New York v. Bridges*, 189 S. W. 6, 172 Ky. 161,

L. R. A. 1917C, 276). So, too, where gasoline ordered by one of the plaintiffs for use at his home was delivered at the insured factory while the buyer was out, and, when he returned shortly thereafter, he directed it to be set outside, where it remained for an hour, when it was taken away, the presence of gasoline under such circumstances was not a violation of the policy insuring the factory (*Clute v. Clintonville Mut. Fire Ins. Co.*, 129 N. W. 661, 144 Wis. 638, 32 L. R. A. [N. S.] 240). In *Hanover Fire Ins. Co. v. Eisman*, 45 Okl. 639, 146 Pac. 214, it was held that gasoline was not "stored," within the terms of an insurance policy, by the keeping of a small quantity thereof in a closed retainer for occasionally cleaning wearing apparel; and in *Ertischek v. New Hampshire Fire Ins. Co. of Manchester*, 162 N. Y. Supp. 1047, 98 Misc. Rep. 279, it was held that breach of clause of fire policy prohibiting keeping of benzine on premises will not relieve insurer from liability, where breach consisted in keeping small quantities of forbidden article for dyeing laces, etc., purpose analogous to cleaning clothes, oiling machinery, etc. In *American Cent. Ins. Co. v. Clancey*, 60 Tex. Civ. App. 61, 127 S. W. 577, the policy was on a building used as a restaurant. Gasoline was kept on the premises for use in carrying on the business. Sometimes gasoline was delivered at the restaurant for use in it and in the business of insured in another building; but the quantity used in such other business was not kept in the restaurant, but was sent to such other building. It was held that the gasoline so sent out was not "kept, used, or allowed" on the premises insured.

The use of a gasoline torch by a painter for burning off the old paint on the building will not void the policy (*Lebanon County v. Franklin Fire Ins. Co.*, 237 Pa. 360, 85 Atl. 419, 44 L. R. A. [N. S.] 148, Ann. Cas. 1914B, 130), especially where the work has continued for less than the 15 days allowed by the policy for repairs (*Garrebrant v. Continental Ins. Co.*, 75 N. J. Law, 577, 67 Atl. 90, 12 L. R. A. [N. S.] 443).

1700-1704. (g) Same—Prohibited articles as part of stock in trade

1700 (g). Under a policy covering a number of enumerated articles and "such other merchandise as is usually kept for sale in a retail hardware store," the insured had a right to carry in stock a small quantity of dynamite, it being shown that it was customary among hardware merchants in the vicinity to keep this article in stock (*Traders' Ins. Co. v. Dobbins & Ewing*, 86 S. W. 383, 114 Tenn. 227)

1701 (g). In the absence of fraud or mistake, recovery cannot be had on a fire policy, conditioned to "be void if (any use or custom of trade * * * to the contrary notwithstanding) there be * * * on the above-described premises * * * fireworks," where fireworks were kept in stock in the building at the time of the fire, and this, though the building was insured as a "general merchandise" store, and fireworks are generally kept in such a store; the keeping of them not being necessary in such a business, and this, too, though the prohibition is in the printed part, and the description of the business to be conducted on the premises is in writing, the written part not overriding the printed part, except in case of irreconcilable conflict (*Norfolk Fire Ins. Co. v. Talley*, 112 Va. 413, 71 S. E. 534, Ann. Cas. 1913B, 806).

1704-1706. (h) Same—Articles necessarily or customarily used in business

1705 (h). Where the policy covered a merchant tailor's stock, claimed by insurer to have been avoided by a provision in the policy prohibiting the keeping of benzine on the premises, insured had a right to show the understanding of the parties in using the term "the stock of a merchant tailor," and that keeping of a small quantity of benzine was contemplated (*Gropper v. Home Ins. Co.*, 135 N. Y. Supp. 1028, 77 Misc. Rep. 132). The use of an article prohibited by the printed clause will not avoid the policy, where such article is customarily a part of the goods insured or is in customary use in the business conducted in the insured building.

McClure v. Mutual Fire Ins. Co. of Chester County, 88 Atl. 921, 242 Pa. 59, 48 L. R. A. (N. S.) 1221; *Ertlschek v. New Hampshire Fire Ins. Co. of Manchester*, 162 N. Y. Supp. 1047, 98 Misc. Rep. 279; *Bouchard v. Dirigo Mut. Fire Ins. Co.*, 113 Me. 17, 92 Atl. 899, L. R. A. 1915D, 187.

1709-1710. (k) Effect of breach of condition—As dependent on relation to time and cause of loss

1710 (k). Though a fire destroying the insured property was not caused by explosives stored in the building, contrary to the terms of the policy, and though the explosives were removed in time to prevent an explosion, breach of the condition was material to the risk, and avoided the policy, under Rev. St. 1899, § 7973, providing that no condition in an insurance policy shall be construed otherwise than as a representation unless material to the risk insured against (*Kenefick v. Norwich Union Fire Ins. Soc.*, 103 S. W. 957, 205 Mo. 294).

1710-1711 FORFEITURE OF CONTRACT—INSURANCE OF PROPERTY

1710-1711. (l) Same—Acts of third persons

1710 (l). The general rule seems to be well established that a forfeiture cannot be excused by showing that the breach of the condition as to the presence or use of prohibited articles was the act of a tenant, and without the knowledge of the insured.

Edwards v. Farmers' Mut. Ins. Ass'n of Georgia, 57 S. E. 707, 128 Ga. 353, 12 L. R. A. (N. S.) 484, 119 Am. St. Rep. 385, 10 Ann. Cas. 1036; *McCurdy v. Orient Ins. Co.*, 30 Pa. Super. Ct. 77; *Westchester Fire Ins. Co. v. Ocean View Pleasure Pier Co.*, 56 S. E. 584, 106 Va. 633.

1711 (l). But in *Queen Ins. Co. v. Van Giesen*, 136 Ga. 741, 72 S. E. 41, it was held that under a policy stipulating that it should be void if gasoline were kept, used, or allowed on the premises, if an employé of the insured carried a can of gasoline on the premises to burn the house containing the goods insured, and it was so used without the knowledge or complicity of insured, such act was not keeping, using, or allowing gasoline upon the premises by the insured.

1711-1712. (m) Questions of practice

1712 (m). Whether the presence of a small quantity of rags on insured premises at the time of the fire increased the hazard, so as to avoid the policy, is a question of fact (*North British Mercantile Ins. Co. v. Union Stockyards Co.*, 87 S. W. 285, 120 Ky. 465, 27 Ky. Law Rep. 852). So, too, the court cannot know as a matter of law that 10 or 15 bundles of baled hay left on the gallery of a house increases the hazard of fire insured against in a policy stipulating that it shall be void if the hazard is increased, where the evidence only showed that the hay was left on the gallery by being thrown off a wagon, because storage room was lacking at a mill, and that it was left there until the wagons could return from the mill; but the question is for the jury (*Hamburg-Bremen Fire Ins. Co. v. Swift*, 62 Tex. Civ. App. 78, 130 S. W. 670). Where the evidence showed that fireworks were kept at Christmas time, and insured claimed that the custom so to do prevented what would otherwise be an avoidance of the policy, it was held question as to whether keeping of such fireworks was excusable because of the general custom so to do should have been submitted to the jury (*Powell v. Commonwealth Ins. Co.*, 60 S. E. 120, 3 Ga. App. 436).

Where it was claimed but not conclusively established that the fire resulted from an explosion of gasoline, an instruction that the prohibition against keeping or allowing gasoline to be kept on the

premises meant more than a mere casual taking of gasoline on the premises and removing it soon after, and that the burden was on defendant to show by a fair preponderance of the evidence that plaintiff exposed the property insured to the additional hazard of habitually keeping gasoline on the premises for a considerable time, was not erroneous as in effect charging that there would be no violation of the policies, though gasoline was permitted to remain on the premises from the time it was delivered there without the knowledge of one of the plaintiffs to be used elsewhere until the fire occurred (*Clute v. Clintonville Mut. Fire Ins. Co.*, 129 N. W. 661, 144 Wis. 638, 32 L. R. A. [N. S.] 240).

In action on fire policy stipulating against keeping benzine on premises, plaintiff's evidence that it was custom of his trade to keep on hand dyestuffs containing benzine is admissible as tending to establish that such dyestuff was one of supplies referred to in description of insured property (*Ertischek v. New Hampshire Fire Ins. Co. of Manchester*, 162 N. Y. Supp. 1047, 98 Misc. Rep. 279).

The sufficiency of the evidence to show whether insured kept gasoline within the building containing the insured property, in violation of a warranty against doing so is considered in *Hilburn v. Phoenix Ins. Co.*, 140 Mo. App. 355, 124 S. W. 63.

13. FORFEITURE BY REASON OF CHANGE OF TITLE, INTEREST, OR POSSESSION IN GENERAL

1713-1716. (a) Nature and construction of conditions

1715 (a). There is no change of title, interest, or possession, where by the alleged transfer no interest passes, no possession or right of possession is given and the parties thereto do not intend any such change (*Cone v. Century Fire Ins. Co.*, 139 Iowa, 205, 117 N. W. 307).

It has been held in Kansas that the word "interest," in the condition that the policy shall be void "if any change shall take place in the interest, title, or possession of the subject of insurance," applies only where insured owns and insures an interest less than title, and has no application where the insured owns the title.

Garner v. Milwaukee Mechanics' Ins. Co., 73 Kan. 127, 84 Pac. 717, 4 L. R. A. (N. S.) 654, 117 Am. St. Rep. 460, 9 Ann. Cas. 459; *Pomeroy v. Aetna Ins. Co.*, 86 Kan. 214, 120 Pac. 344, 38 L. R. A. (N. S.) 142, Ann. Cas. 1913C, 170.

But it was said in *Finkbohner v. Glens Falls Ins. Co.*, 6 Cal. App. 379, 92 Pac. 318, that the term "interest" is not limited to a change in the legal title, but extends to both legal and equitable rights.

That the constitution of a mutual fire insurance company provides that whoever sells or exchanges his property loses all insurance rights, etc., does not invalidate a policy issued to a husband on property owned by his wife (*Kludt v. German Mut. Fire Ins. Co.*, Auburn, Fond du Lac County, 140 N. W. 321, 152 Wis. 637, 45 L. R. A. [N. S.] 1131, Ann. Cas. 1914C, 609).

A warranty that "none of the automobiles herein described are rented to others" spoke as of the date of the policy, and was not violated because thereafter, and at the accident on which assured's cause of action was based, it was so rented (*Mayor, Lane & Co. v. Commercial Casualty Ins. Co.* [Sup.] 150 N. Y. Supp. 624). So, in a policy insuring a dwelling house, provisions that it should be void if the interest of the insured was other than an unconditional ownership, or if the dwelling was on ground not owned by the insured, referred to the date of the policy, and it was not avoided by a subsequent sale of the ground (*Insurance Co. of North America v. O'Bannon* [Tex. Civ. App.] 170 S. W. 1055).

A purchaser paying the price of property increased his interest therein, but not the risk of the insurer (*Houran v. Ætna Ins. Co.*, 183 Mich. 418, 150 N. W. 137).

1716 (a). A change of corporate name of insured worked no change in entity of the corporation affecting validity of policy (*Terminal Ice & Power Co. v. American Fire Ins. Co.*, 196 Mo. App. 241, 194 S. W. 722); and that one person acquired all the shares of a mercantile corporation was not a change of title which would avoid an insurance policy issued in favor of the corporation (*Hamburg-Bremen Fire Ins. Co., of Hamburg, Germany, v. Ohio Valley Dry Goods Co.'s Trustee*, 169 S. W. 724, 160 Ky. 252, Ann. Cas. 1916B, 944).

1716-1720. (b) Effect of change in general

1716 (b). The existence of an interest in the insured in property covered by the fire insurance policy is indispensable to its validity, since the contract is one of indemnity (*Springfield Fire & Marine Ins. Co. v. Boon* [Tex. Civ. App.] 194 S. W. 1006).

A transfer of the property insured contrary to the conditions of the policy will, of course, forfeit the insurance.

Osborn v. American Ins. Co., 151 Ill. App. 126; *Bartling v. German Mut. Lightning & Tornado Ins. Co. of Farmers of Maxfield and Vicinity*,

154 Iowa, 335, 134 N. W. 864; *Buffalo Fertilizer Co. v. Aroostook Mut. Fire Ins. Co.*, 84 Atl. 1078, 109 Me. 483; *Harper v. Michigan Mut. Tornado, Cyclone & Windstorm Ins. Co.*, 173 Mich. 459, 139 N. W. 27; *Rochester German Ins. Co. v. Monumental Sav. Ass'n*, 107 Va. 701, 60 S. E. 93; *Plockzek v. St. Paul Fire & Marine Ins. Co.* (N. J.) 91 Atl. 812; *Wiley v. London & Lancashire Fire Ins. Co.*, 89 Com. 35, 92 Atl. 678; *Hamilton v. Fireman's Fund Ins. Co.* (Tex. Civ. App.) 177 S. W. 173; *Moore v. St. Paul Fire & Marine Ins. Co.*, 176 Iowa, 549, 156 N. W. 676; *Swaine v. Teutonia Fire Ins. Co.*, 109 N. E. 825, 222 Mass. 108.

1717 (b). In *Dull v. Royal Ins. Co.*, 159 Mich. 671, 124 N. W. 533, it appeared that a tornado policy was issued to an individual who had previously contracted to convey the property to a corporation of which he was a member. Subsequently he conveyed the property to a third person as trustee for the corporation. No notice of the transfer was given insurer. It was held that the policy was void at its issue, or became void on the transfer of the title, unless the soliciting agent knew of the condition of the title at the time of issue of the policy, and knew of the transfer, and his knowledge was binding on insurer.

A fire policy, stipulating that it should be void if, without the assent of insurer, the property of insured should be sold, and that any loss should be paid to the mortgagee as its interests might appear, and that no act of any other person than the mortgagee should affect its right to recover in the event of a loss, is invalidated by a sale by insured without the consent of insurer, except as to the mortgagee, and after a sale the amount necessary to protect the mortgagee remains in force, subject to the terms of the policy (*Flint v. Westchester Fire Ins. Co.*, 93 N. E. 646, 207 Mass. 337).

Where the "loss payable" clause, in favor of a materialman, in a policy of fire insurance, attached as a rider, did not contain a stipulation that policy conditions should apply to any person's interest in the subject-matter, a sale by the owner before loss held not to relieve the insurer of liability to the materialman under a stipulation of the policy relating to change in title (*Royal Ins. Co. v. O. L. Walker Lumber Co.*, 24 Wyo. 59, 155 Pac. 1101, Ann. Cas. 1917E, 1174, affirming judgment on rehearing, 23 Wyo. 264, 148 Pac. 340).

In *Camden Fire Ins. Ass'n v. Bomar* (Tex. Civ. App.) 176 S. W. 156, a policy was held not invalidated by deed to H., to which change of title insurance agent consented, though H. had not bought the land, the deed having been made by direction of real estate agents.

1716-1720 FORFEITURE OF CONTRACT—INSURANCE OF PROPERTY

A defense of breach of condition by change of ownership can only be relied upon at the trial when it has been interposed by special plea (*American Ins. Co. v. Egyptian Lodge No. 802*, 1. O. O. F., 128 Ill. App. 161). The question of forfeiture by change of interest, title, or possession is a mixed question of law and fact (*Zeitler v. Concordia Fire Ins. Co.*, 169 Mich. 555, 135 N. W. 332).

Under conflicting evidence, whether the insured automobile was sold before or after the issuance of the policy was for the jury (*Commercial Union Assur. Co., Limited, of London v. Lyon & Kelly*, 17 Ga. App. 441, 87 S. E. 761).

The sufficiency of the evidence to show a change in interest, title, or possession is considered in *Merchants' & Bankers' Fire Underwriters v. Brooks* (Tex. Civ. App.) 188 S. W. 243; *Springfield Fire & Marine Ins. Co. v. Boon* (Tex. Civ. App.) 194 S. W. 1006; *Rochester German Ins. Co. v. Monumental Sav. Ass'n*, 107 Va. 701, 80 S. E. 93; *Moore v. St. Paul Fire & Marine Ins. Co.*, 176 Iowa, 549, 156 N. W. 676.

1719 (b). A transfer of the insured property to the cashier of a bank, in trust for the bank, is a breach of the condition, though the insurer had consented to an absolute transfer to the cashier (*Smith v. Retail Merchants' Fire Ins. Co.*, 29 S. D. 332, 137 N. W. 47, 42 L. R. A. [N. S.] 173). So, where insured property was under trust deed, purchaser agreeing to deed property back to trustee, insured ceased to have any interest therein, and the policy became void (*Springfield Fire & Marine Ins. Co. v. Boon* [Tex. Civ. App.] 194 S. W. 1006).

1720 (b). To constitute a breach of the condition against alienation, there must be a completed sale.

Bartemeier v. Central Nat. Fire Ins. Co. (Iowa) 160 N. W. 24; *Bartling v. German Mut. Ins. Co.* (Iowa) 123 N. W. 63; *Cone v. Century Fire Ins. Co.*, 139 Iowa, 205, 117 N. W. 307.

A clause of an insurance policy on a stock of goods, providing for avoidance of the policy in case of change of ownership, does not apply where title is regained before loss by fire.

Germania Fire Ins. Co. v. Turley, 179 S. W. 1059, 167 Ky. 57, Ann. Cas. 1917C, 931; *Weisberger v. Western Reserve Ins. Co. of Cleveland*, Ohio, 95 Atl. 402, 250 Pa. 155.

So, where a fire policy provided for avoidance on a change of interest, and the insured conveyed the property, taking a reconveyance, evidence that there was no consideration for the original conveyance is admissible (*Wiley v. London & Lancashire Fire Ins.*

Co., 89 Conn. 35, 92 Atl. 678). In *Marcus v. Rhode Island Ins. Co.*, 187 Mo. App. 134, 173 S. W. 30, however, it was held that sale by plaintiff of the insured premises avoids the policy, when it contains a provision to that effect, and a sale back to the plaintiff does not work a revivor.

Where one owning a laundry business conducted under the name of a company as a trade-name, insured the property, the policy providing that it should be void if there was any change in the interest, title, or possession of the property, and thereafter sold the business to others, who continued it under the same name, the policy not being transferred to them, and the insurer having no notice of the sale, the sale forfeited the policy; the contract being personal with the owner (*American Steam Laundry Co. v. Hamburg Bremen Fire Ins. Co.*, 121 Tenn. 13, 113 S. W. 394, 21 L. R. A. [N. S.] 442).

1721-1723. (d) Acquiring additional title or interest

1722 (d). Where a mortgage on real estate is secured by an insurance policy issued to a mortgagor, loss, if any, payable to the mortgagee, the standard mortgage clause being attached, and the mortgagee subsequently receives a conveyance of the mortgaged property and holds the same as security for the mortgage debt, the mortgage will not become merged in the legal title, so as to relieve the insurance company from liability in case of fire (*Ft. Scott Building & Loan Ass'n v. Palatine Ins. Co., Limited*, of London, 86 Pac. 142, 74 Kan. 272). So, too, though a mortgagee, after condition broken, may enter and account to the mortgagor for the rental value of the premises, such possession is not inconsistent with his position as mortgagee, nor is he the absolute owner within the clause of a fire policy issued to the mortgagor, avoiding the policy on a transfer of title to the property, and this title does not become legal by the mere execution by the mortgagor of a deed delivered to a third person in escrow for delivery to the mortgagee on the performance of specified conditions, and, until delivery, the policy is valid (*Walton v. Phoenix Ins. Co.*, 162 Mo. App. 316, 141 S. W. 1138). But it was held in *Boston Co-op. Bank v. American Cent. Ins. Co.*, 201 Mass. 350, 87 N. E. 594, 23 L. R. A. (N. S.) 1147, that a sale to himself by a mortgagee of the mortgaged property under a power of sale is a "sale" within the condition, though the policy was payable to the mortgagee as his interest may appear.

There was a breach of the condition where the insured conveyed

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the premises by a deed absolute in form containing covenants of warranty, though the grantee on the same day agreed to reconvey the property to the insured on his paying a specified sum; the interest acquired by the insured under the agreement being a new interest, distinct from that possessed by him when the policy was issued (*Bennett v. Mutual Fire Ins. Co.*, 100 Md. 337, 60 Atl. 99).

1723-1724. (e) Change of possession

1723 (e). A provision that a change in possession of the property insured against fire should avoid the policy applies rather to the person than the location of the property (*Steil v. Sun Ins. Office of London*, 171 Cal. 795, 155 Pac. 72).

A leasing of the insured premises by the legal owner with the assent of the insured, who was the equitable owner, the lessee going into actual possession, does not avoid the policy under the condition as to change of possession; the word "possession," in the condition, having reference to the legal possession or possessory right (*McGinnis v. St. Paul Fire & Marine Ins. Co.*, 38 Pa. Super. Ct. 390).

A fire insurance policy, providing against "change of possession," was not breached by change of landlord's possession to that of his tenant.

Terminal Ice & Power Co. v. American Fire Ins. Co. (Mo. App.) 187 S. W. 564; *Same v. Home Ins. Co.* (Mo. App.) 187 S. W. 568; *Same v. Lumbermen's Ins. Co.* (Mo. App.) 187 S. W. 568; *Same v. Security Ins. Co.* (Mo. App.) 187 S. W. 568; *Same v. Commercial Fire Ins. Co.* (Mo. App.) 187 S. W. 569; *Same v. Stuyvesant Ins. Co.* (Mo. App.) 187 S. W. 569; *Terminal Ice & Power Co. v. American Fire Ins. Co.*, 196 Mo. App. 241, 194 S. W. 722.

1724 (e). There is no change of possession, forfeiting the policy, where one to whom is given an option to purchase enters into possession for experimental purposes, subject to the free access and management of the owner (*Mackintosh v. Agricultural Fire Ins. Co.*, 150 Cal. 440, 89 Pac. 102, 119 Am. St. Rep. 234).

Leaving insured personal property in the building where insured, in the custody of an occupant who was without control over the property otherwise than to hold it for the assured, did not constitute a change in the interest, title, or possession of the subject of the insurance (*Linglebach v. Theresa Village Mut. Fire Ins. Co.*, 143 N. W. 688, 154 Wis. 595).

On the other hand, in *Sewell v. Home Ins. Co.*, 131 App. Div. 131, 115 N. Y. Supp. 345, it was held that there was a change of

possession, from that of a tenant to a vendee in possession, avoiding the policy, where during the term of the lease the property was sold to one then in physical possession as resident agent of the lessee, and thereafter, while he continued to reside on the property, no further rent was paid, but he, in addition to his cash payment of the purchase, commenced to pay interest on his deferred payments, and made extensive alterations on the premises; the presumption being that his occupancy was that of vendee under the contract, he having, in the absence of an express agreement, an implied consent that he might enter into possession as owner.

14. FORFEITURE BY REASON OF VOLUNTARY CHANGE OF TITLE OR INTEREST

1729-1731. (b) Partnership transactions in general

1730 (b). As regards the provision of a fire policy voiding it in the event of any change in interest, title, or possession of the subject-matter of insurance, insured having taken in two partners, put one in possession, and received part of the price, it is immaterial that he retained a lien on the goods for balance of price, and after the fire paid back the money to his partners (*Mechanics' & Traders' Ins. Co. v. Davis* [Tex. Civ. App.] 167 S. W. 175). So, where an insurance policy covering partnership property is voidable by change of title, a sale of his interest by one partner to a third person affects the risk, because a new party is brought into contractual relations with the insurer (*Firemen's Ins. Co. v. Larey*, 188 S. W. 7, 125 Ark. 93, L. R. A. 1917A, 29, Ann. Cas. 1917B, 1225).

1731-1732. (c) Conveyance to wife

1731 (c). A conveyance by the insured to his wife, either directly or through a third person, violates the condition against change of title or interest, and terminates the policy.

Kompa v. Franklin Fire Ins. Co., 28 Pa. Super. Ct. 425; *Chulek v. United States Fire Ins. Co.*, 30 Pa. Super. Ct. 435; *King v. Lancaster County Mut. Ins. Co.*, 45 Pa. Super. Ct. 464.

The fact that, on reconveyance to the wife, the husband acquires an interest as tenant by curtesy is immaterial (*King v. Lancaster County Mut. Ins. Co.*, 45 Pa. Super. Ct. 464).

That plaintiff, in notifying insured's agent of transfer of title from her husband to herself, failed to tell him that their marital relations were hostile, and that divorce was pending, is not a fraudu-

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lent concealment of facts material to the risk (*Continental Ins. Co. v. Bradley*, 189 S. W. 706, 172 Ky. 549).

1732-1733. (d) Transfer of part interest

1733 (d). In *Watts v. Phenix Ins. Co.*, 134 Ga. 717, 68 S. E. 479, the policy provided that it should be void if any change other than by death of the insured took place in the interest or title of the subject of insurance. When the policy was issued, insured was the sole owner of the building and the land. Subsequently, without the consent of the insurance company, he sold and conveyed an undivided one-half interest in the land on which the building was situated, reserving full title to the building, with the right to remove the same. This was held to constitute such a change in the interest of the insured as to avoid the policy.

A fire policy's provision, voiding it for any change in insured's interest or title, does not apply where he sells the land, retains title to the house to be removed, balance of price to be then paid (*Fidelity-Phoenix Fire Ins. Co. v. O'Bannon* [Tex. Civ. App.] 178 S. W. 731).

1733-1737. (e) Contract for sale

1734 (e). A mere option contract for the sale of insured property, under which nothing is done before loss, is not within a condition against change of title.

Terminal Ice & Power Co. v. American Fire Ins. Co., 196 Mo. App. 241, 194 S. W. 722; *Terminal Ice & Power Co. v. American Fire Ins. Co.* (Mo. App.) 187 S. W. 564; *Same v. Home Ins. Co.* (Mo. App.) 187 S. W. 568; *Same v. Lumbermen's Ins. Co.* (Mo. App.) 187 S. W. 568; *Same v. Security Ins. Co.* (Mo. App.) 187 S. W. 568; *Same v. Commercial Fire Ins. Co.* (Mo. App.) 187 S. W. 569; *Same v. Stuyvesant Ins. Co.* (Mo. App.) 187 S. W. 569; *House v. Security Fire Ins. Co.*, 145 Iowa, 462, 121 N. W. 509.

Nor is there a change of interest in the insured property, which works a forfeiture, where a contract for purchase thereof is given, which amounts to a mere option, with rights of possession for experimental purposes, subject to free access and management by the owner (*Mackintosh v. Agricultural Fire Ins. Co.*, 150 Cal. 440, 89 Pac. 102, 119 Am. St. Rep. 234). But a proviso of a fire insurance contract against change or alienation of interest is breached by contract of sale of insured property, where the vendee is placed in possession (*Cardwell v. Virginia State Ins. Co.* [Ala.] 73 South. 466).

The broad rule that the condition against change of title is not broken by a contract to sell which has not been performed before the loss is laid down in some cases.

Reference may be made to *National Fire Ins. Co. v. Three States Lumber Co.*, 75 N. E. 450, 217 Ill. 115, 108 Am. St. Rep. 239, affirming judgment 119 Ill. App. 67; *Garner v. Milwaukee Mechanics' Ins. Co.*, 73 Kan. 127, 84 Pac. 717, 4 L. R. A. (N. S.) 654, 117 Am. St. Rep. 460, 9 Ann. Cas. 459. And compare *Swank v. Farmers' Ins. Co.*, 126 Iowa, 547, 102 N. W. 429, where there was an agreement to sell conditioned on the ability of the proposed vendee to raise a certain amount on the property. *O'Neil v. Franklin Fire Ins. Co. of Philadelphia*, 145 N. Y. Supp. 432, 159 App. Div. 313.

1736 (e). The condition, as expressed in the standard forms of policies, usually provides that the policy shall be void if there is any change in the interest, title, or possession of the insured property. The rule seems to be well established in many jurisdictions that a contract to sell is a breach of this condition.

Finkbohner v. Glens Falls Ins. Co., 6 Cal. App. 379, 92 Pac. 318; *Brickell v. Atlas Assur. Co.*, 10 Cal. App. 17, 101 Pac. 16; *Widincamp v. Phoenix Ins. Co.*, 62 S. E. 478, 4 Ga. App. 759; *Manning v. North British & Mercantile Ins. Co.*, 99 S. W. 1095, 123 Mo. App. 456; *Grunauer v. Westchester Fire Ins. Co.*, 62 Atl. 418, 72 N. J. Law, 289, 3 L. R. A. (N. S.) 107; *Brighton Beach Racing Ass'n v. Home Ins. Co.*, 93 N. Y. Supp. 654, 47 Misc. Rep. 177, affirmed 99 N. Y. Supp. 219, 113 App. Div. 728, affirmed 82 N. E. 1124, 189 N. Y. 526; *Gorsch v. Niagara Fire Ins. Co.*, 68 Misc. Rep. 344, 123 N. Y. Supp. 877; *Vancouver Nat. Bank v. Law Union & Crown Ins. Co. (C. C.)* 153 Fed. 440.

Thus in *Brighton Beach Racing Ass'n v. Home Ins. Co.*, 113 App. Div. 728, 99 N. Y. Supp. 219, affirmed in 189 N. Y. 526, 82 N. E. 1124, it was held that there was a change of "title," as well as of "interest" and "possession," where insured, the owner in fee of the insured property, makes a contract of sale of it, declaring that deed shall pass when final payment is made, and that the purchaser shall pay all taxes and assessments levied against the property subsequent to contract, and shall have the right to occupy the property before passing of title, as tenant of the seller, without pay, and the purchaser goes into possession and is not in default. The theory of the cases seems to be that by contracts of this character the equitable title is vested in the purchaser and the insured loses his insurable interest.

Brickell v. Atlas Assur. Co., 10 Cal. App. 17, 101 Pac. 16; *Vancouver Nat. Bank v. Law Union & Crown Ins. Co. (C. C.)* 153 Fed. 440.

The rule applies, whether the subject of insurance be realty or personalty (*Vancouver Nat. Bank v. Law Union & Crown Ins. Co.* [C. C.] 153 Fed. 440). In *Brecht v. Law Union & Crown Ins. Co.* (C. C.) 153 Fed. 452, the owner of a sawmill property, including the mill, machinery, and logs and lumber, the personalty being subject to a chattel mortgage, entered into a contract with the chattel mortgagee by which he purported to convey and transfer to said mortgagee all of the property, both personal and real, with authority to take possession and to operate the mill and to sell any and all of the property, the owner agreeing to execute conveyances of the same as required by him. In consideration of such contract the grantee agreed to pay certain indebtedness of the owner, including his own, and to apply to that purpose all sums received from the operation of the mill or sales of the property, after deducting expenses, the surplus, if any, to be paid over to the grantor. It was held that such contract was not a mortgage, but a trust agreement or deed, which vested the absolute title to the property in the grantee, and that it avoided a policy of insurance previously issued to the grantor on the property containing a provision that it should be void if his interest in the property should be or become other than unconditional and sole ownership.

But it was held in *Zeitler v. Concordia Fire Ins. Co.*, 169 Mich. 555, 135 N. W. 332, that the making of an executory contract by an administrator to sell the property of the estate for decedent's debts did not constitute a breach of the condition.

1737 (e). In *Swank v. Farmers' Ins. Co.*, 126 Iowa, 547, 102 N. W. 429, it appeared that the plaintiff, as the owner of property insured, made an agreement to sell to H. for a specified price; possession to be given March 1, 1902. The contract, however, was conditioned on the ability of H. to raise \$5,500 on the property; it being agreed that, unless such sum was raised, the deal was off. To enable H. to raise such loan, a contract and deed were executed, and placed in the hands of loan brokers to hold, and not to be delivered without plaintiff's permission. The title being defective, an action was brought in H.'s name to cure the same, and thereafter a portion of the property was destroyed by fire before H. obtained the money or any sale was consummated. It was held that such transaction did not constitute a sale or contract to sell the property, within a policy providing that it should be void in case of a sale or contract to sell the property, or if any change or diminution other than death take place in the interest, title, or possession of insured.

That a contract to sell shall constitute a breach of the condition it must be a completed contract that may be enforced. So, where the holder of a policy delivers in escrow a deed of the premises, and the house insured is destroyed by fire while occupied by the grantee before the conditions of the escrow are performed, hazard from fire not being increased, the right to recover on the contract of insurance is not forfeited (*Pomeroy v. Ætna Ins. Co.*, 120 Pac. 344, 86 Kan. 214, 38 L. R. A. [N. S.] 142, Ann. Cas. 1913C, 170). So, too, ownership of property insured was not divested within a provision making the policy void on that condition by delivery to a United States district attorney of a deed running to the United States and abstracts of title under a contract to sell, where approval of the papers by the Attorney General was required to make the sale binding (*German Fire Ins. Co. v. Duncan*, 130 S. W. 804, 140 Ky. 27). And in *Seaman v. Anchor Fire Ins. Co.*, 149 Iowa, 583, 128 N. W. 934, it was held that there is no sale of insured property, or of any interest in it, so as to defeat the insurance, where the one to whom it had been willed in trust, with a life estate to him, made a contract for sale of the trust property, without being authorized by the will or the court to sell it.

A contract which is not enforceable because within the statute of frauds is not a violation of the condition. Thus, it was held in *Moseley v. Northwestern Nat. Ins. Co.*, 109 Mo. App. 464, 84 S. W. 1000, that there was no change in interest where a real estate agent, having verbal authority merely, makes a contract of sale not in writing, and gives a receipt for part of the purchase money, the balance to be paid if title proved good, and the owner executes a deed and gives it to the agent to deliver on payment of the balance of purchase money. So, too, there is no violation of the condition where the insured has given an option or made a conditional sale which cannot be specifically enforced and where the risk of loss continues to be his (*Rochester German Ins. Co. v. Monumental Sav. Ass'n*, 107 Va. 701, 60 S. E. 93).

In *Foiles v. Detroit Fire & Marine Ins. Co.*, 175 Mich. 716, 141 N. W. 879, and *Same v. Dixie Fire Ins. Co.*, 175 Mich. 723, 141 N. W. 882, it was held that a fire policy, requiring the insured to notify the insurer of any transfer of interest on which the defendant had indorsed its agreement that the property had been sold under contract to a certain named person was not forfeited by a reconveyance of the purchaser's rights after default.

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1737-1740. (f) Incumbrance of property

1738 (f). A mortgage or deed of trust for security of a debt is not a "transfer or change of title" to the property insured, within a policy of insurance, which would render the policy void if made without the consent of the company.

Seyler v. British America Assur. Co., 72 W. Va. 120, 77 S. E. 555;
Bushnell v. Farmers' Mut. Ins. Co., 85 S. W. 103, 110 Mo. App.
223; Western Assur. Co. v. Hillyer-Deutsch-Jarratt Co. (Tex. Civ.
App.) 167 S. W. 816.

And, especially is this true if attached to the policy is a mortgage clause making the loss, if any, payable to the mortgagee (Clark v. National Union Fire Ins. Co., 159 Ill. App. 256). And in Delaware Ins. Co. v. Hill (Tex. Civ. App.) 127 S. W. 283, it was said that a mortgage, taken by a retiring partner, who sells his interest to the remaining copartner, to secure a part of the purchase money, is not within the condition of a policy prohibiting a change of interest without the consent of the insurer under the rule that the policy remains operative so long as the insured retains any interest in the property, legal or equitable, to the extent of the interest so retained. In Fenton v. Cascade Mut. Fire Ass'n, 60 Wash. 389, 111 Pac. 343, there was attached to the policy a rider which by its terms made the loss or damage under the policy payable to the mortgagee "as interest may appear." The mortgagee afterwards took a second mortgage on the property without notice to the insurer. It was held that the words "as interest may appear" should be construed to mean such interest as by proper proofs was shown to appear at the time of loss, so that the second mortgage was not a breach of a condition in the policy calling for notice of any change of ownership or increase of hazard, etc.

1739 (f). In North Carolina the giving of a mortgage is held to be within the condition against change of title or interest.

Modlin v. Atlantic Fire Ins. Co., 151 N. C. 35, 85 S. E. 605; Watson v. North Carolina Home Ins. Co., 159 N. C. 638, 75 S. E. 1105.

1740-1742. (g) Defeasible conveyance

1741 (g). A conveyance absolute on its face, though intended merely as security, is a breach of the condition against change of title or interest.

Athens Mut. Ins. Co. v. Evans, 64 S. E. 993, 132 Ga. 703; Bennett v. Mutual Fire Ins. Co., 60 Atl. 99, 100 Md. 337; O'Connor v. Decker, 30 Pa. Super. Ct. 579; Louisville German Mut. Fire Ins. Ass'n v. Schneider, 165 Ky. 285, 176 S. W. 1154.

In Minnesota, however, it has been held that property covered by bill of sale given as security is not "assigned" within forfeiture provision in fire policy (*King v. Hartford Fire Ins. Co., of Hartford, Conn.*, 133 Minn. 322, 158 N. W. 435).

In the Bennett Case it was held that the policy is rendered void by a conveyance of the premises by a deed absolute in form, containing covenants of warranty, though the grantee on the same day agreed to resell the property to the assured on his paying a specified sum; the interest of the assured acquired by the agreement being a new interest, distinct from that possessed by him when the policy was issued.

1742 (g). In *Pennsylvania Fire Ins. Co. v. Waggener*, 44 Tex. Civ. App. 144, 97 S. W. 541, it appeared that when the policy was issued there was a lien on the property insured, and in adjusting a difference that arose in regard thereto it was agreed between insured and the lienholders that the debt would be reduced to a certain sum and a change in the form of the evidence of security should be made, in that insured was to execute a deed to the property to the lienholders, and they should retransfer the property to insured, he to execute a deed of trust to them to secure the amount agreed on. These instruments were signed on a certain date by all the parties except one of the lienholders, who was absent, but who, about two weeks later, upon his return, signed the transfer back to insured, thus consummating the agreement theretofore made between the parties. The papers, during such two weeks, were held by the lienholders. It was held that such transaction did not change the status of the title to the property, and was not a breach of that clause of the policy relating to change of title.

Where an insurance company which was also mortgagee of the premises, was liable as insurer, though no policy had been issued because it had agreed to look after the insurance, it was not relieved of its liability as insurer by a conveyance as security two years before the loss because the policy, if issued, would have been subsequent to such conveyance. *Commonwealth Fire Ins. Co. v. Obenchain* (Tex. Civ. App.) 151 S. W. 611.

1742-1744. (h) Invalid conveyances and transfers in fraud of creditors

1743 (h). Though a deed to a creditor of the insured to secure a debt would under the general rule be a breach of the condition, such would not be its effect if the deed is void for usury (*Athens Mut. Ins. Co. v. Evans*, 136 Ga. 584, 71 S. E. 892). But in *Chulek*

v. United States Fire Ins. Co., 30 Pa. Super. Ct. 435, it was held that a conveyance by the insured to a third person, followed by a conveyance by such person to the insured's wife, will constitute a violation of the covenant though the insured and his wife and the person through whom the conveyance was made to the wife unite in testifying that the deed by the insured was the result of a fraudulent conspiracy between the insured's wife and such third person.

In *Cone v. Century Fire Ins. Co.*, 139 Iowa, 205, 117 N. W. 307, certain buildings and the furniture and fixtures in one of them were insured by plaintiff in defendant company. Plaintiff executed a mortgage on the insured property to a bank in another state purporting to secure a certain note, and on the same day executed a warranty deed to his sister, conveying the real estate on which the buildings stood for an expressed consideration, subject to the mortgage mentioned. The deed and mortgage were recorded, but in fact no consideration passed for either, and neither was ever in the possession of those in whose favor they were executed. A deed to the property was executed by plaintiff's sister on the same day and delivered to him; the object of the transactions being to avoid trouble relative to taxes on merchandise. It was held that there was no "change or diminution in the interest, title, or possession" of the property insured, within the meaning of a forfeiture clause in the policy, since no interest passed and no possession or right of possession was given, and the parties did not intend any such change.

In *Rosenstein v. Traders' Ins. Co.*, 102 App. Div. 147, 92 N. Y. Supp. 326, it was held that there was a change of title within the prohibition of the policy where it appeared that by and in accordance with the mutual plans and intentions of the insured and his son, a conveyance of the property by the insured to his son was executed for the purpose of so transferring the title of the property to the son that he could give a clear title on an expected sale to a third person, and save the title and transfer from being incumbered or embarrassed by any proceedings on a judgment which existed against the father, and that it was the expectation and plan that the title should be so transferred from the father to the son that it could not be touched by proceedings on the judgment, and the proposed sale interfered with.

Where, in an action on a fire policy, insured testified that he had conveyed the property to his wife without her knowledge, and

had placed the bill of sale of record to keep the property out of the reach of his creditors, and that the bill of sale was never delivered to the wife, the question of delivery was properly submitted to the jury (*Goodwin v. Union Ins. Co. of Philadelphia*, 163 Mich. 41, 127 N. W. 790).

1744-1745. (i) Sale—Retaining lien or taking mortgage for purchase money

1744 (i). Where insured conveyed the property to another and took a mortgage back to secure the price, such transaction constituted a change of interest which avoided the policy (*Jump v. North British & Mercantile Ins. Co.*, 44 Wash. 596, 87 Pac. 928, 12 Ann. Cas. 257).

1745 (i). A conditional sale of an insured stock of merchandise, reserving title till the price is paid, is a change in interest, within the provision avoiding the policy in case of such change.

Phoenix Ins. Co. v. Quinette, 36 Okl. 384, 128 Pac. 722; *Fire Ass'n of Philadelphia v. Perry* (Tex. Civ. App.) 185 S. W. 374.

1745-1746. (j) Lease of property

1746 (j). Where the policy provides that the policy shall be void if any change takes place in interest, title, or possession, except change of occupants without increase of hazard, a leasing of the insured premises by the legal owner, with the consent of the insured, the equitable owner, and placing the lessee in actual possession of the premises, without any increase of hazard, does not avoid the policy, as the word "possession" means legal possession or possessory right (*McGinnis v. St. Paul Fire & Marine Ins. Co.*, 38 Pa. Super. Ct. 390).

In *Queen of Arkansas Ins. Co. v. Pendola*, 94 Ark. 594, 128 S. W. 559, it appeared that insured sold the property to another, notifying the insurer thereof. Subsequently the buyer hired and delivered the property to another who, in turn, hired and delivered it to a third person. The insurer had no notice of the last two transfers until after the goods were destroyed by fire. It was held that the last two transfers, without the insurer's consent, avoided the policy.

1746-1747. (k) Policy on stock in trade

1746 (k). Where an insurance policy on a stock of goods provided that it should be void in case of alienation of the property, a sale in bulk of goods worth \$400 out of a stock valued at \$9,000 will

not forfeit the policy, for it is presumed that it contemplated a continuous sale from and replenishment of the stock (*Sheets v. Iowa State Ins. Co.*, 153 Mo. App. 620, 135 S. W. 80).

In the original text attention was called to *Burke v. Continental Ins. Co.*, 100 App. Div. 108, 91 N. Y. Supp. 402, in which it was held that a sale of the entire output of a manufacturing plant will not constitute a change of title within the meaning of a policy on the product of the plant, especially where the sale is conditional and the seller remains liable for all losses, except by fire, and agrees to pay premiums for insurance on the product. The facts were these: The C. Company, manufacturers and owners of a stock of glass, insured it under a policy covering its own or that held by it in trust, or sold, but not delivered, for which it might be held liable, and thereafter sold and delivered the glass to the I. Company, agreeing at the same time that all glass manufactured by it within a specified time should be the property of the vendee as soon as manufactured and subject to the latter's order. It was further agreed that in the meanwhile the glass should be stored in the warehouse of the insured, leased to the vendee for that purpose, the insured to assume responsibility for all loss except loss by fire. The glass was to be insured by the vendee; the vendor, however, to pay the premium. In view of this state of facts, the Court of Appeals in *Burke v. Continental Ins. Co.*, 184 N. Y. 77, 76 N. E. 1086, reversed the judgment below, holding that under the agreement the entire insurable interest in the property was in the vendee. On a motion for rehearing attention was called to the fact that before the fire the vendor and the vendee entered into an agreement whereby the vendor assumed liability for any loss by fire. The motion for rehearing was denied, however, on the ground that the evidence did not show any such agreement. On the second trial, the evidence to support this subsequent agreement was entirely uncontradicted, and it was therefore held in *Burke v. Continental Ins. Co.*, 128 App. Div. 391, 112 N. Y. Supp. 865, that by reason of this modification of the agreement the insurable interest of the vendor was preserved as to property sold, but not delivered, and the policy was not void.

15. FORFEITURE BY REASON OF INVOLUNTARY CHANGE IN TITLE OR INTEREST**1747-1749. (a) Assignment for creditors and proceedings in insolvency or bankruptcy**

1747 (a). The general rule seems to be that a transfer to a trustee in bankruptcy proceedings, whether voluntary or involuntary, will forfeit the insurance.

In re M. I. Hibbler Mach. Supply Co. (D. C.) 192 Fed. 741; Smith v. Retail Merchants' Fire Ins. Co., 29 S. D. 332, 137 N. W. 47, 42 L. R. A. (N. S.) 173; Roper v. National Fire Ins. Co. of Hartford, 76 S. E. 869, 161 N. C. 151; Smith v. Security Mut. Fire Ins. Co. of Chatfield, Minn., 37 S. D. 418, 158 N. W. 991; Bartemeier v. Central Nat. Fire Ins. Co. (Iowa) 160 N. W. 24.

A complaint in an action on fire insurance policy providing for avoidance on change of title or interest, which did not state that plaintiff had not qualified as trustee in bankruptcy of the insured prior to the fire, does not state a cause of action. Smith v. Security Mut. Fire Ins. Co., 29 S. D. 328, 137 N. W. 46, Ann. Cas. 1914D, 930.

But it was held in Marcello v. Concordia Fire Ins. Co., 234 Pa. 31, 82 Atl. 1090, 39 L. R. A. (N. S.) 366, that a policy providing that it should be void on any change of interest or possession of the property of insured, is not rendered void by the fact that receiver in involuntary bankruptcy took possession of the property, under Bankruptcy Act 1898, until proceeding was dismissed or trustee appointed.

In Gordon v. Mechanics' & Traders' Ins. Co., 120 La. 441, 45 South. 384, 15 L. R. A. (N. S.) 827, 124 Am. St. Rep. 434, 14 Ann. Cas. 886, the assured filed a petition in bankruptcy February 1st. February 2d the stock of merchandise was destroyed by fire. February 5th a trustee in bankruptcy was appointed, and in May the district court confirmed a composition with assured's creditors. In an action on the policy thereafter judgment was rendered for plaintiff. It was held that, as the property insured was destroyed before either a receiver or trustee in bankruptcy had been appointed, the incidents of interest and possession at the time of the loss were in the bankrupt, and, when the trustee was appointed, there was no property in existence to which the title in the trustee could vest.

1748 (a). It has been held in North Carolina (Southern Pants Co. v. Rochester German Ins. Co., 159 N. C. 78, 74 S. E. 812) that

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the appointment of a receiver for a corporation is not a change in title or interest within the prohibition. But in *Bronson v. New York Fire Ins. Co.*, 64 W. Va. 494, 63 S. E. 283, 19 L. R. A. (N. S.) 643, 16 Ann. Cas. 868, it was held that under a policy on personalty providing that, if any change in the interest, title, or possession by legal process or judgment or otherwise, the policy should be void, the appointment of a receiver in a suit to take possession of the property would prevent recovery where he takes actual possession.

1749-1751. (b) Devolution of property by death of insured

1749 (b). Change of title by will or descent does not avoid a fire policy in the standard form (*Towle v. Dirigo Mut. Fire Ins. Co.*, 107 Me. 317, 78 Atl. 374).

1750 (b). A policy payable to an estate will protect the property while in the administrator's hands, and the making of an executory contract by an administrator to sell the property of an estate for decedent's debts will not forfeit the policy thereon payable to the estate, under a clause avoiding the policy for any change of interest, title, or possession (*Zeitler v. Concordia Fire Ins. Co.*, 169 Mich. 555, 135 N. W. 332).

1751-1753. (c) Levy of execution, attachment, or other process

1751 (c). The levying of a writ of attachment on land without a change of possession is not such a change in interest or title as will avoid a policy insuring the buildings appurtenant to the land, and providing that the policy shall be void on a change in the interest or title (*O'Toole v. Ohio German Fire Ins. Co.*, 123 N. W. 795, 159 Mich. 187, 24 L. R. A. [N. S.] 802).

1753-1755. (d) Effect of judgment and judicial sale

1754 (d). There is a change of interest and title within a policy, issued to an administrator, on decedent's property, conditioned to be void if any change takes place in the interest, title, or possession of the subject of insurance, where an administrator's sale, ordered to be made for cash, has been made and confirmed, though no deed has passed, and there has been no payment of purchase money or change of possession; the sale being valid under *Ballinger's Ann. Codes & St. § 6274* (*Pierce's Code, § 2582*), from the time of the confirmation, and the sale being specifically enforceable notwithstanding subsequent destruction of the property (*Moller v.*

Niagara Fire Ins. Co., 103 Pac. 449, 54 Wash. 439, 24 L. R. A. [N. S.] 807, 132 Am. St. Rep. 1115).

The mere rendition of a judgment against the owner of insured property avoids the policy, under a condition providing that it should be void if any change should take place in the interest, title, or possession of the insured (*Kelley v. People's Nat. Fire Ins. Co.*, 104 N. E. 188, 262 Ill. 158, 50 L. R. A. [N. S.] 1164, affirming 181 Ill. App. 142).

An execution sale of insured property merely amounting to a cloud on the title did not divest insured of ownership within meaning of policy (*Terminal Ice & Power Co. v. American Fire Ins. Co.* [Mo. App.] 194 S. W. 722).

In *Mechanics' & Traders' Ins. Co. v. Boyce*, 114 Miss. 165, 74 South. 821, L. R. A. 1917E, 328, it was held that sale of insured property for taxes is not a breach of covenants of policy; the two years of redemption not having expired, and the purchaser having no right of possession and owning no title till such expiration.

1755-1760. (f) Foreclosure of mortgage or sale under power therein

1758 (f). A sale to himself by a mortgagee of the mortgaged property under a power of sale, without insurer's consent, was a "sale," within a provision that the policy should be void on sale of the property without insurer's assent, though the policy was made payable to the mortgagee as its interest might appear (*Boston Co-op. Bank v. American Cent. Ins. Co.*, 87 N. E. 594, 201 Mass. 350, 23 L. R. A. [N. S.] 1147). It has been held, on the other hand, that foreclosure by insured himself of mortgage he has bought in on insured property in order to perfect title does not avoid a policy under provision against "foreclosure proceedings" (*Terminal Ice & Power Co. v. American Fire Ins. Co.* [Mo. App.] 187 S. W. 564; *Same v. Home Ins. Co.*, Id. 568; *Same v. Lumbermen's Ins. Co.*, Id.; *Same v. Security Ins. Co.*, Id.; *Same v. Commercial Fire Ins. Co.*, Id. 569; *Same v. Stuyvesant Ins. Co.*, Id.).

A clause in a fire policy payable to the mortgagee, which provided that it should be forfeited on foreclosure, has been held not to relieve the insurer from liability (*Citizens' State Bank of Chautauqua v. Shawnee Fire Ins. Co.*, 137 Pac. 78, 91 Kan. 18, 49 L. R. A. [N. S.] 972).

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1760-1763. (g) "Commencement of foreclosure proceedings" and "notice of sale"

1760 (g). A stipulation in a policy that it shall be void if, with the knowledge of insured, foreclosure proceedings be commenced or notice given of a sale of any property covered by his policy by virtue of any mortgage, is valid.

Jones & Pickett v. Michigan Fire & Marine Ins. Co., 61 South. 846, 132 La. 847; Liverpool & London & Globe Ins. Co. v. Lavine, 59 South. 336, 5 Ala. App. 392.

The condition is a proper safeguard against increased risk, and a breach thereof will forfeit the policy.

J. I. Kelley Co. v. St. Paul Fire & Marine Ins. Co., 56 Fla. 456, 47 South. 742, 16 Ann. Cas. 654; Hartford Fire Ins. Co. v. Hollis, 58 Fla. 268, 50 South. 985.

However, it was said in Liverpool & London & Globe Ins. Co. v. Lavine, 5 Ala. App. 392, 59 South. 336, that the mere fact of the commencement of proceedings by a mortgagee to foreclose the mortgage does not as a matter of law substantially increase the risk within a stipulation that the policy shall be void if the risk be increased by any means within the knowledge of the insured. Moreover, the mere fact that the insured filed a waiver of service in foreclosure proceedings was not proof that he knew of the commencement of such proceedings (Philadelphia Underwriters' Agency of the Fire Ass'n of Philadelphia v. Neurenberg [Tex. Civ. App.] 144 S. W. 357). But where insured mortgagor endeavored to arrange to postpone foreclosure proceedings and was notified thereof the day they were commenced, a failure to procure from the insurer an agreement to be indorsed on the policy consenting to its continuation rendered the policy void in the absence of a waiver (J. I. Kelley Co. v. St. Paul Fire & Marine Ins. Co., 56 Fla. 456, 47 South. 742, 16 Ann. Cas. 654).

1763 (g). Where the policy provided that it should be void if foreclosure proceedings should be commenced, and also that if, with the consent of the insured, an interest under the policy should exist in favor of a mortgagee, the conditions of the policy should apply in the manner expressed in such provisions and conditions relating to such interest as shall be written upon, attached or appended thereto, and the policy contained an indorsement making any loss payable to the mortgagee subject to the conditions of the policy, the commencement of foreclosure proceedings by a mortgagee

to whom the policy had been assigned forfeited the policy (*Algase Co. v. Corporation of Royal Exchange Assur. of London, England*, 67 Wash. 173, 122 Pac. 986).

Condition avoiding policy, if foreclosure proceedings were commenced with "knowledge" of insured refer to actual knowledge, or actual notice, as distinguished from constructive notice.

Brown v. Connecticut Fire Ins. Co., of Hartford, Conn. (Mo. App.) 195 S. W. 62; *Same v. Providence-Washington Ins. Co., Id.*, 65; *Dodge v. Grain Shippers' Mut. Fire Ins. Ass'n*, 176 Iowa, 316, 157 N. W. 955; *Funk v. Anchor Fire Ins. Co.*, 171 Iowa, 331, 153 N. W. 1048.

Fire insurance policy provision that if, with insured's knowledge, foreclosure proceedings were commenced, the policy should become void, was not applicable where policy was issued after publication of foreclosure notice (*Terminal Ice & Power Co. v. Commercial Fire Ins. Co.*, 196 Mo. App. 516, 196 S. W. 408).

An insurance policy, with mortgage clause attached, providing that the policy shall not become void for any act or neglect of the mortgagor or owner, will not be avoided in the mortgagee's hands by commencement of foreclosure proceedings.

Jones v. Phoenix Ins. Co., 84 Kan. 235, 146 Pac. 354; *Rostetter v. American Ins. Co.*, 184 Ill. App. 157.

The foreclosure of a mechanic's lien is not a breach of the condition declaring the policy void if "foreclosure proceedings be commenced or notice given of the sale of any property covered by this policy by virtue of any mortgage or trust deed" (*Burton-Lingo Co. v. Patton*, 15 N. M. 304, 107 Pac. 679, 27 L. R. A. [N. S.] 420).

16. SUBSEQUENT INCUMBRANCE OF PROPERTY INSURED AS GROUND OF FORFEITURE

1765-1767. (a) Nature and validity of condition

1765 (a). A provision in an insurance policy that a mortgage placed upon the property insured shall render the policy void, unless consent of the company thereto shall be indorsed in writing on the policy, is valid and enforceable.

Mulrooney v. Royal Ins. Co., 163 Fed. 833, 90 C. C. A. 317; *Mulrooney v. Royal Ins. Co. of Liverpool, Eng.* (C. C.) 157 Fed. 598; *Weddington v. Piedmont Fire Ins. Co.*, 141 N. C. 234, 54 S. E. 271, 8 Ann. Cas. 497; *Springfield Fire & Marine Ins. Co. v. Chandlee*, 41 App. D. C. 209; *St. Paul Fire & Marine Ins. Co. v. Peck*, 37 Okl. 85, 130 Pac. 805.

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1768-1769. (c) Construction of condition in general—Voluntary or involuntary incumbrances

1768 (c). Provision in fire insurance policy that mortgage or incumbrance should avoid it relates to liens voluntarily placed on the property by the insured, and does not apply to judgment obtained against him or other liens upon the property created by law (*Continental Ins. Co. v. Bair* [Ind. App.] 114 N. E. 763).

1769-1771. (d) What constitutes an incumbrance

1770 (d). A lien on personal property insured, reserved in a lease to secure rent, is not a chattel mortgage within a provision of the policy that the execution of a chattel mortgage thereon should avoid it (*Phoenix Ins. Co. of Hartford v. Fleenor*, 104 Ark. 119, 148 S. W. 650).

1772-1773. (f) Notice of and consent to incumbrances

1772 (f). In *Mulrooney v. Royal Ins. Co.* (C. C.) 157 Fed. 598, the policy, which was on a stock of merchandise, provided that it should be void "if the subject of insurance be personal property and be or become incumbered by a chattel mortgage," and that no officer, agent, or representative of the company should have power to waive any condition, unless such waiver should be written upon or attached to the policy. The insured executed a bill of sale of the property intended as a mortgage, an assignment of the policy was written thereon to the mortgagee, and the agents of the company made an indorsement thereon, consenting that the interest of the insured "as owner of the property covered by the policy" be assigned to the assignee. Neither indorsement showed the nature of the assignee's interest. It was held that such indorsement was not a consent to the incumbrance of the property.

Where a live stock policy provided that it should be void in case of mortgage without permission, it was sufficient that insurer gave permission by notice to its local agent, without indorsement on the policy (*National Live Stock Ins. Co. v. Jackson*, 169 S. W. 695, 160 Ky. 228).

1773-1775. (g) What constitutes a breach of condition

1774 (g). Policies on tobacco in the warehouse of a corporation whether held by it as owner or bailee are not avoided by a chattel mortgage given by one of the depositors, although policies pro-

vided that they should be void if the property should be incumbered (*Kline Bros. & Co. v. Royal Ins. Co.* [C. C.] 192 Fed. 378).

In *Hartford Fire Ins. Co. v. Liddell Co.*, 130 Ga. 8, 60 S. E. 104, 124 Am. St. Rep. 157, the facts were as follows: A policy of insurance was issued to A. on certain personalty and provided that the loss should be payable to B. and C. as their interest appeared. At the time B. was a purchase-money creditor, retaining title to one of the articles, and the interest of C. was of a similar character as to the other. Such facts were known to the company. Subsequently A. gave B. a chattel mortgage on his interest in the article purchased from C. The policy provided that it should be void if the subject of insurance was personal property incumbered by a chattel mortgage. It was held that the execution of the chattel mortgage to B. forfeited the policy.

A transaction, whereby personal property was conveyed as security for a debt, is not a chattel mortgage, and so not to avoid an insurance policy which provided that, if the subject-matter of the insurance should be mortgaged, the policy should be void (*Monongahela Ins. Co. v. Batson*, 111 Ark. 167, 163 S. W. 510). Within the clause of a fire policy providing for a forfeiture, "if the subject of insurance be personal property, and becomes incumbered by a chattel mortgage," there is no forfeiture because of a mortgage on land "with all improvements thereon situate," if the insured property on the land is a fixture (*Rawls v. American Central Ins. Co.*, 81 S. E. 505, 97 S. C. 189).

In *Stocker v. Dubuque Fire & Marine Ins. Co.*, 160 N. W. 1035, 164 Wis. 614, a trust deed was held to cover only real estate and fixtures a part thereof, and not to be a chattel mortgage within St. 1915, § 1941—46, providing that insurance policy shall be void if subsequently incumbered by chattel mortgage.

A mortgage or deed of trust covering the insured property and purporting to secure an obligation not yet effective at time of loss is not an incumbrance avoiding an insurance policy (*Downey v. National Fire Ins. Co., of Hartford, Conn.*, 77 W. Va. 386, 87 S. E. 487). Insured is entitled to show that, under the laws of the state where the trust deed was executed and delivered, a trust deed was not a chattel mortgage, within the meaning of the clause forbidding such incumbrances (*Lambert v. Security Mut. Fire Ins. Co.*, 58 Pa. Super. Ct. 624).

In *Great Southern Fire Ins. Co. v. Burns & Billington*, 118 Ark. 22, 175 S. W. 1161, L. R. A. 1916B, 1252, Ann. Cas. 1917B, 497, a

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fire policy, issued without written application, despite condition that it should be void if the property be incumbered, was held valid though the property was subject to a chattel mortgage. In *Hartford Fire Ins. Co. of City of Hartford, Conn., v. Downey*, 223 Fed. 707, 139 C. C. A. 237, however, a corporation, issuing bonds by a deed of trust on all its property to secure a renewal note, was held to incumber its personal property, within a fire policy declaring that the same should be void on the property becoming incumbered. And under provision of fire policy against incumbrances made without insurer's indorsed consent, incumbrances when policy issues or during life of policy without such indorsement unless waived, constitutes breach of warranty against such incumbrances (*Riley v. Ætna Ins. Co.*, 92 S. E. 417, L. R. A. 1917E, 983).

1775-1777. (h) Same—Invalid and inoperative incumbrances

1775 (h). In *Humboldt Fire Ins. Co. v. W. H. Ashley Silk Co.*, 185 Fed. 54, 107 C. C. A. 274, it appeared that a mortgage was given by a silk manufacturing company to secure an issue of bonds, by virtue of a resolution of its board of directors authorizing a mortgage upon "the mill property, * * * its boilers, engines, buildings, stacks, silk winding, spinning, reeling, and quilling machinery, dynamos and electric light plant." The mortgage described the real estate and property above enumerated, and also "fixtures, materials, and all other property on the said above-described premises situate, * * * to have and to hold all and singular the above-described real and personal properties," etc. The boilers, engines, and machinery described were a part of the silk manufacturing plant, and were all attached to the real estate by being set in concrete or brick, or by lag screws attaching them to the floor. The mortgage was not recorded as a chattel mortgage, as required by the law of New Jersey, where the property was situated. It was held that under the law of New Jersey it was not a "chattel mortgage," within the meaning of a provision of an insurance policy covering the machinery and personal property in the mill making it void in case the personal property insured should be incumbered by a chattel mortgage.

An insurance policy providing that if the property should become incumbered the policy would be void, will not be rendered invalid by mortgage not a valid lien on the property. So, where insured executed a mortgage to secure a note payable more than a year after date for rent to become due under a lease, to begin five years in

the future, and the insured's property is destroyed by fire before the commencement of the term, the mortgage is not an incumbrance within the policy (*Rowland v. Home Ins. Co.*, 82 Kan. 220, 108 Pac. 118, 136 Am. St. Rep. 104).

1779-1780. (j) Effect of breach of condition

1779 (j). Where a fire policy does not stipulate against incumbrances, the insurer's obligation is not impaired by the placing of an incumbrance on the property during the life of the policy (*Cooper v. American Cent. Ins. Co.*, 123 S. W. 497, 139 Mo. App. 570).

But see *Lawver v. Globe Mut. Ins. Co.*, 25 S. D. 549, 127 N. W. 615, holding that under Laws S. D. 1905, c. 126, prescribing a standard form of fire policy and forbidding the insurer to insert any special conditions, the insurer is entitled to such an interpretation of a clause making the policy void because of increase in the hazard occasioned by the insured as will include a mortgage placed on the property by insured.

Where there is a specific condition in the policy against incumbrances, a breach of such condition is ground of forfeiture.

Hartford Fire Ins. Co. v. Liddell Co., 130 Ga. 8, 60 S. E. 104, 124 Am. St. Rep. 157; *Moore v. Crandall*, 146 Iowa, 25, 124 N. W. 812, 140 Am. St. Rep. 276; *Atlas Reduction Co. v. New Zealand Ins. Co.*, 138 Fed. 497, 71 C. C. A. 21, 9 L. R. A. (N. S.) 433, affirming (C. C.) 121 Fed. 929; *Manufacturers' Mut. Fire Ins. Co. v. Swaney*, 53 Ind. App. 429, 101 N. E. 843; *Roper v. National Fire Ins. Co. of Hartford*, 76 S. E. 869, 161 N. C. 151; *McKernan v. North River Ins. Co. (D. C.)* 206 Fed. 984; *North British & Mercantile Ins. Co. v. Wright (Okla.)* 154 Pac. 654; *Georgia Home Ins. Co. v. Hoskins*, 71 Fla. 282, 71 South. 285; *Security Ins. Co. v. Laird*, 182 Ala. 121, 62 South. 182.

In *Cottingham v. Maryland Motor Car Ins. Co.*, 168 N. C. 259, 84 S. E. 274, L. R. A. 1915D, 344, Ann. Cas. 1917B, 1237, under policy of insurance prohibiting incumbrances or changes in title or interest, chattel mortgage was held merely to suspend insurance, which, therefore, revived upon payment and cancellation of the mortgage. In *Houran v. Aetna Ins. Co.*, 183 Mich. 418, 150 N. W. 137, the liability of a fire insurer was held by equally divided court, unaffected by a conveyance, as security only.

Where, in negotiations before issuance of policy, insured made false representations as to incumbrance, with intent to deceive, provisions of Laws 1911, p. 197, § 34, as to breach of warranty, merely reducing insurance or not preventing recovery unless in existence

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at the time of the loss and contributing thereto, have no application (*Woods v. Insurance Co. of State of Pennsylvania*, 82 Wash. 563, 144 Pac. 650).

17. SPECIAL CIRCUMSTANCES AND CONDITIONS AFFECTING THE RISK

1783-1784. (a) In general

1783 (a). In *Hartford Fire Ins. Co. v. Dorroh*, 63 Tex. Civ. App. 560, 133 S. W. 465, it appeared that prior to the fire insured received an anonymous letter to the effect that some one was moving goods frequently at night from an adjoining building with a view of subsequently burning the building thus being vacated. The court discussing the relation of this to the clause in the policy relating to increase of hazard held that the hazard, if any, did not arise from the writing and receipt of the letter, but from the actual existence of the occurrence referred to therein; and hence, in order for insurer to maintain a forfeiture of the policy because of insured's failure to communicate the increased hazard, it was bound to prove, not only the writing and the receipt of the letter by insured, but that the condition referred to actually existed to insured's knowledge, and that he failed to report the same. Furthermore, the court held that the clause providing that the policy should be void if the hazard was increased by any act within the control or knowledge of the insured, did not include insured's failure to communicate information relating to an increase of hazard, through means of which he had knowledge, though not within his control, consisting of an attempt on the part of others to burn an adjoining building. The court said in effect that the term "hazard," as used in a fire policy, means the incurring of the possibility of loss or harm for the possibility of a benefit; the insurer undertaking to indemnify the insured against the possibility of a loss by fire for an agreed consideration paid in advance; the hazard consisting of the possibility of a loss by fire indicated by the sum of all dangers resulting from the recognized exposure, including losses from incendiary fires communicated from other premises.

A single effort by an unknown person to set fire to a building in which insured property was situated is not within a stipulation in the policy that it shall be void if the hazard be increased by any means within the control or knowledge of insured, and the failure of insured to inform insurer of the effort or to take steps to prevent its repetition does not defeat a recovery for a loss by an incendiary

fire (*Williamsburgh City Fire Ins. Co. v. Weeks Drug Co.* [Tex. Civ. App.] 133 S. W. 1097). To the same effect is *Williamsburgh City Fire Ins. Co. v. Weeks Drug Co.*, 103 Tex. 608, 132 S. W. 121, 31 L. R. A. (N. S.) 603, where the court said in effect that under the clause as to increase of risk, the risk intended to avoid the policy is one the means of creating which is to be within the control or knowledge of insured, and among the risks against which it is the purpose of insurance to guard insured is incendiarism and mere negligence.

In *Ampersand Hotel Co. v. Home Ins. Co.*, 131 App. Div. 361, 115 N. Y. Supp. 480, it was held that under the clause relating to increase of risk, it is a good defense that insured corporation, through one who owned nearly all its stock and who was its director, treasurer, and manager, conspired with a specified person and others, whereby it was planned that such person should procure some one to burn the property to enable insured to collect the insurance, and that while the plan and conspiracy still existed and was in process of accomplishment the property was burned.

It has been held in South Dakota (*Lawver v. Globe Mut. Ins. Co.*, 25 S. D. 549, 127 N. W. 615) that under the provisions of Laws 1905, c. 126, prescribing a standard form of fire policy and forbidding the insurer to insert any special provisions, the insurer is entitled to such an interpretation of a clause making the policy void because of increase in the hazard occasioned by insured as will include a mortgage placed upon the property by insured.

The hazard and danger of damage by fire of an insured structure is not increased by a judgment of a court decreeing it to be a nuisance and ordering its removal (*Irwin v. Westchester Fire Ins. Co.*, 109 N. Y. Supp. 612, 58 Misc. Rep. 441, affirmed in 133 App. Div. 920, 118 N. Y. Supp. 1115).

1787-1788. (c) Methods of heating building—Use of heat in manufacturing

1787 (c). In *Krell v. Chickasaw Farmers' Mut. Fire Ins. Co.*, 127 Iowa, 748, 104 N. W. 364, where the question on which defendant was entitled to be heard and to offer evidence was whether there was any greater hazard of loss by fire on account of the use of the feed cooker in the insured barn than would have been occasioned by the use therein of a tank heater, it was held that any error in excluding the testimony of an expert as to whether the placing and use of a feed cooker in the barn, where no fire had ever been used

before, would have the effect to increase the hazard, was not prejudicial to defendant. Whether the use of a feed cooker instead of a tank heater in an insured building was an increase of the risk was a question for the jury.

1788. (d) Method of lighting premises

1788 (d). A provision that a fire policy should be void if "the hazard is increased by any means within the knowledge or control of the insured" did not authorize proof that the gasoline lighter from the explosion of which a fire resulted was defective for weeks before the fire and that the insured knew or should have known of the defect, where it was not shown that the risk resulting from the use of the lighter was increased by any means within the knowledge or control of the insured (*German Ins. Co. v. Goodfriend*, 97 S. W. 1098, 30 Ky. Law Rep. 218).

1788-1791. (e) Use of steam engine on the premises

1789 (e). In *Siemers v. Meeme Mut. Home Protection Ins. Co.*, 143 Wis. 114, 126 N. W. 669, 139 Am. St. Rep. 1083, the facts were these: The policy which covered farm buildings provided that if the risk should be increased by any means within the control of the assured, or be occupied in any way so as to render the risk more hazardous than at the time of insurance, the insurance should be void. It also provided that the company would not be liable for loss caused by the use of steam threshing machines, unless a ladder was kept between the engine and separator, and a barrel of water and two pails were kept between the engine and barn, and a watchman employed to watch the engine during its operation. In order to cut ensilage a wood-burning steam engine was brought upon the farm, and located within 20 feet of one of the buildings. Shortly before noon the persons operating the engine removed the spark arrester and ran it a few minutes without the arrester, and left the engine in that condition when they went in to dinner. While at dinner, fire was discovered in a barn about 60 feet from the engine, and all of the buildings were burned. It was held that it is a matter of common knowledge that cutting fodder by a steam engine is customary on a farm, and that it was within the contemplation of the parties that such work might be done, and that the provision in the policy as to steam threshers only forbade their employment in the ordinary operations around farm buildings where the required precautions were not taken, and therefore the question whether the

risk had been increased by the use of the engine was not for the jury.

Whether the proximity of a portable steam engine to the building increased the probability of fire, and thereby increased the hazard within the provision of the policy relating to an increased hazard, is a question of fact for the jury (*Cramer v. Blooming Grove Mut. Fire Ins. Co.*, 63 Pa. Super. Ct. 276).

1791-1792. (f) Miscellaneous conditions or circumstances

1791 (f). A provision in a fire insurance policy that the insurer shall not be liable for a loss resulting from an open fire built by insured with his knowledge and consent within 50 feet from any insured building is not a condition, the breach of which works a forfeiture but is an exception from the risk insured against (*Draper v. Oswego County Fire Relief Ass'n*, 82 N. E. 755, 190 N. Y. 12, affirming 115 App. Div. 807, 101 N. Y. Supp. 168).

A provision in a fire policy warranting that the automobile insured should not be leased or used for carrying passengers for compensation is a promissory warranty, a breach of which prevents recovery (*Orient Ins. Co. v. Van Zandt-Bruce Drug Co.*, 151 Pac. 323). Such a provision is breached where, with insured's knowledge and consent, his son for compensation which he received and retained, made trips with the automobile for passengers, whether the risk was increased or not (*Elder v. Federal Ins. Co.*, 100 N. E. 655, 213 Mass. 389). However, a provision of an automobile fire policy that the machine should not be used to carry passengers for compensation has been held only to prohibit the use of the machine continuously for carrying passengers as a business.

Commercial Union Assur. Co. of London v. Hill (Tex. Civ. App.) 167 S. W. 1006; *Crowell v. Maryland Motor Car Ins. Co.*, 109 N. C. 35, 85 S. E. 37, Ann. Cas. 1917D, 50.

That plaintiff's son-in-law attempted, without his knowledge, to smoke meat in a shed, fire resulting, was no such alteration or increase of the risk with plaintiff's consent, as would avoid the policy (*Andrews v. Dirigo Mut. Fire Ins. Co.*, 91 Atl. 978, 112 Me. 258).

The use of a gasoline engine in an insured barn, to drive a threshing machine, does not avoid the policy under the clause, prohibiting an alteration of the situation, so as to increase the risk (*Bouchard v. Dirigo Mut. Fire Ins. Co.*, 113 Me. 17, 92 Atl. 899, L. R. A. 1915D, 187).

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A provision of a fire policy insuring lumber in piles, requiring 100 feet clear space between the lumber and any woodworking and manufacturing establishment, was breached by the maintenance of an oilhouse, barn, and elevated driveway in the 100-foot space between the lumber and plaintiff's mill (*Rife v. Lumber Underwriters*, 204 Fed. 32, 122 C. C. A. 346).

1792-1795. (h) Agreements impairing insurer's right of subrogation

1793 (h). Where insured, in a policy providing for an assignment to insurer of any cause of action for a loss by fire, agreed by contract with a railroad company to relieve it from liability for any damage to insured's building from fire set by sparks, etc., insured could not recover on the policy for a loss resulting from fire set by sparks escaping from a locomotive of the railroad company (*Downs Farmers' Warehouse Ass'n v. Pioneer Mut. Ins. Ass'n*, 83 Pac. 423, 41 Wash. 372).

A defense of settlement with a wrongdoer without the consent of the insurer, thus preventing the operation of the subrogation clause in favor of such insurer, is an affirmative defense, and must be sustained by evidence, first, that the claim against such wrongdoer actually existed; second, that the insured, without the consent of the insurer, actually released such claim (*Merchants' Underwriters at Indemnity Exchange v. Parkhurst-Davis Mercantile Co.*, 140 Ill. App. 504, affirmed 86 N. E. 1062, 237 Ill. 492).

18. FAILURE TO COMPLY WITH CONDITIONS AS TO PRECAUTIONS AGAINST LOSS AS GROUND OF FORFEITURE

1796-1797. (a) Nature and construction of statements and conditions in general

1796 (a). A provision of a fire policy, avoiding the policy if insured failed to build brick or stone chimneys within 30 days "from the date of this application," could not be invoked to avoid the policy for noncompliance therewith, where no application was made a part of the policy (*Loyal Mut. Fire Ins. Co. v. J. S. Brown & Bro. Mercantile Co.*, 107 Pac. 1098, 47 Colo. 467). And where an application addressed to a particular company was sent to the agent of the company addressed and of other companies, and he split the insurance putting a portion in each company statements in the application as to employment of watchman were not part of the contract between insured and companies other than the one addressed

(*Waukau Milling Co. v. Citizens' Mut. Fire Ins. Co.*, 130 Wis. 47, 109 N. W. 937, 118 Am. St. Rep. 998, 10 Ann. Cas. 795).

1797 (a). A condition requiring insured to use all reasonable means to save property at the fire, or when endangered by fire, requires the exercise of due care in case of fire, or when the property is menaced by fire (*Beavers v. Security Mut. Ins. Co.*, 76 Ark. 595, 90 S. W. 13, 6 Ann. Cas. 585). Such condition is not violated by removing the spark arrester of an engine before a fire started (*Siemers v. Meeme Mut. Home Protection Ins. Co.*, 143 Wis. 114, 126 N. W. 669, 139 Am. St. Rep. 1083).

In an action for the partial destruction of merchandise, assured cannot recover if he ignored a provision requiring him to "separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article, and the amount claimed thereon" (*Kaplan v. Manufacturers' & Merchants' Mut. Fire Ins. Co.*, 55 Pa. Super. Ct. 8). However, it has been held that a provision in a fire policy requiring separation of damaged and undamaged goods after a fire is directory merely, and a failure to comply with it would not avoid the policy, but would only reduce the recovery by such amount as was lost to the insurer by failure to comply (*Homestead Fire Ins. Co. v. Ison*, 110 Va. 18, 65 S. E. 463). In *Campbell v. Germania Fire Ins. Co. of New York*, 158 N. W. 63, 163 Wis. 329, the evidence was held to warrant a finding that the insured exercised reasonable care to protect the property as required by the policy. And where an insured automobile was totally destroyed by successive fires, negligence of the insured in not safeguarding the automobile after the first fire has been held not to defeat recovery (*St. Paul Fire & Marine Ins. Co. v. Huff* [Tex. Civ. App.] 172 S. W. 755).

1798. (b) Notice of sickness of animal insured

1798 (b). Assured's obligation to perform the terms of a policy requiring him to call a veterinary, and to notify the insurer of the sickness of the insured animal does not arise until there is substantial reason for believing the animal is sick (*Colley v. National Live Stock Ins. Co.*, 185 Mo. App. 616, 171 S. W. 663); and sending of telegram at 8:30 a. m., notifying insurer of stallion that the animal was ill, it having been attacked the previous evening and attended by veterinaries and owner all night is a compliance with the policy providing that the insurer should be notified forthwith (*Simmons*

1799-1801 FORFEITURE OF CONTRACT—INSURANCE OF PROPERTY

v. National Live Stock Ins. Co., 187 Mich. 551, 153 N. W. 696, Ann. Cas. 1917D, 42).

1799-1801. (d) Appliances for extinguishing fires—Water supply

1799 (d). Where an insurance company expects to rely on a constant and every ready water supply for the extinguishment of fires, it must clearly provide therefor in its policies (McEvoy v. Security Fire Ins. Co. of Baltimore, 73 Atl. 157, 110 Md. 275, 22 L. R. A. [N. S.] 964, 132 Am. St. Rep. 428).

1802-1803. (f) Same—Maintaining automatic sprinkler

1803 (f). In Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co., 56 Wash. 681, 106 Pac. 194, 28 L. R. A. (N. S.) 593, it was held on the original hearing of the case that a stipulation requiring insured to use due diligence in maintaining an automatic sprinkler system in good working order, is a warranty, and not a representation, and that the working of a mill for three weeks with the system disconnected, where it could have been connected in a few hours, is a breach of the warranty, avoiding the policy, though the system was in working order at the time of the fire. On rehearing, however (59 Wash. 501, 110 Pac. 36, 140 Am. St. Rep. 863), the court reversed its decision, and held that the stipulation was not necessarily a warranty, and the policy was not forfeited if at the time of the fire the sprinkler systems were in good working order, though prior to that time they were for a while out of use. The same risk was involved in Port Blakely Mill Co. v. Royal Ins. Co., 186 Fed. 716, 108 C. C. A. 586, and it was held that where a policy authorized additions, alterations, and repairs without limit of time, and also provided that insured warranted that due diligence should be used that the automatic sprinkler system should at all times be made in good order, insured was only bound during the making of repairs to its mill and sprinkler system to use due diligence to maintain the system in good working order.

The promissory warranty in a fire policy that insured will use due diligence at all times to maintain an automatic sprinkler system in good working order is a condition subsequent, as to which the insurer has the burden of proof, and not within Ballinger's Ann. Codes & St. § 4934 (Pierce's Code, § 404), as to pleading and proof of conditions precedent (Port Blakely Mill Co. v. Hartford Fire Ins. Co., 97 Pac. 781, 50 Wash. 657).

The sufficiency of the evidence to require submission of the question of plaintiff's due care in maintaining its sprinkler system in work-

ing order to the jury is considered in *Port Blakely Mill Co. v. Royal Ins. Co.*, 186 Fed. 716, 108 C. C. A. 586.

1803-1805. (g) Employment of watchman

1804 (g). An application for a fire policy, addressed to a particular company, contained a statement that a watchman was kept in the insured mill and made such statement a continuing warranty. The agent who took the application forwarded to one who was an agent for the company addressed and for other companies and he split the insurance up, putting a portion of it in each company. It was held that the application was no part of the contract between insured and the companies other than the one addressed therein (*Waukau Milling Co. v. Citizens' Mut. Fire Ins. Co. of Janesville*, 109 N. W. 937, 130 Wis. 47, 118 Am. St. Rep. 998, 10 Ann. Cas. 795).

1805-1807. (h) Same—What is a sufficient compliance with condition or statement

1806 (h). In *Shoshone Concentrating Co. v. Hamburg-Bremen Fire Ins. Co.*, 64 Wash. 638, 117 Pac. 500, the policy covering an industrial plant provided that, whenever the plant was idle, "competent watchmen shall be employed, and due diligence used to keep a continuous watch both night and day in and immediately around" the re-treating plant and the machinery therein. The plant closed down, and insured employed two watchmen who were the day and night watchmen for a mill operated from 600 to 1,200 feet from insured's plant, it being agreed that they should while on duty as foremen of the mill watch insured's plant as their duties would permit. Their duties required them to go to a place about every hour some 600 to 800 feet from insured's plant from which they could see it. The day watchman was given the keys to the plant, and examined it about four times a week, and, while one of the night watchmen was within 140 feet thereof several times, he never had a key to the plant, which was destroyed by fire at night while the night watchman was attending to his duties as foreman at the mill. Insured knew the duties of the persons employed by it as watchmen. It was held that the policy was forfeited for noncompliance with the provision requiring a continuous watch in and around the insured premises.

In *Manheim Ins. Co. v. Tyner*, 142 Ky. 22, 133 S. W. 1000, a marine policy required that at least two competent watchmen should be employed by the owner, one of whom should be on duty on the vessel at all times. Only one watchman was employed by

the owner, and he, with the owner's consent, had his son watch the vessel a part of the time, the watchman employed being engaged elsewhere during the greater part of the day, and, when both of them were absent, they arranged with the watchman of neighboring gasoline yachts to casually look after the insured vessel from his position on the yacht some 40 or 50 feet away, he not being employed to, and being under no obligation to, look after the insured vessel. It was held that the provision of the policy requiring the employment of two watchmen was breached, so as to prohibit recovery thereon for damage by fire occurring while no one was on the vessel.

1807 (h). Where insured warranted that, if the property described in the policy should be idle or inoperative, a constant day and night watchman should be kept on duty, the burden of proof that insured had complied with such provision was on it, and proof of the presence of the watchman for 30 days prior to the date of the fire was insufficient to show a compliance with the warranty (*Kentucky Vermillion Mining & Concentrating Co. v. Norwich Union Fire Ins. Soc.*, 146 Fed. 695, 77 C. C. A. 121).

In *Theriault v. California Ins. Co. of San Francisco*, 149 Pac. 719, 27 Idaho, 476, Ann. Cas. 1917D, 818, and *Same v. Springfield Fire & Marine Ins. Co.*, 149 Pac. 722, 27 Idaho, 485, the employment of two competent watchmen instructed to watch the property and guard against fire by day and night was held full compliance with a "watchman clause" in the policy.

A warranty in a policy of marine insurance that a competent watchman should always be on board was sufficiently complied with where a competent member of the crew was always detailed as a watchman; the fact that different members of the crew were required to stand different watches, and that they also performed other duties, not being in violation of the warranty (*Mannheim Ins. Co. v. Charles Clarke & Co.* [Tex. Civ. App.] 157 S. W. 291).

Where a policy of burglary insurance required a private watchman, for the fourth floor of a building, this being the premises insured, and the assured failed to employ a watchman, he could not recover, although the owner employed a watchman for the building (*Axe v. Fidelity & Casualty Co. of New York*, 86 Atl. 1095, 239 Pa. 569, 46 L. R. A. [N. S.] 474).

In *St. Paul Fire & Marine Ins. Co. of St. Paul, Minn., v. Kendle*, 163 Ky. 146, 173 S. W. 373, the duties of insured and of watchmen

employed by him under warranty that watchmen would be employed and on duty were stated.

1807-1808. (i) Same—Time during which watch must be kept

1807 (i). In *Mackintosh v. Agricultural Fire Ins. Co.*, 150 Cal. 440, 89 Pac. 102, 119 Am. St. Rep. 234, the policy on a smelter provided that, during such time as the works are idle or not in operation, whether closed for repairs, or during the absence of workmen, or otherwise, a watchman shall be on duty constantly, day and night. It was held that under this condition a watchman at night is not required, where the works are operated during the day, and it is not shown that it was usual or customary to operate such works at night. And it was further held that there is an operation of the works, so that a watchman is not required, though none of the insured furnaces are operated, but only a small furnace, put up, under a shed near the main building, by one to whom insured had given an option for purchase of the premises, and which he was operating daily, with a force of five or six men, for the purpose of testing the slag and ore on the premises.

In *Tillamook Lumbering Co. v. Liverpool & London & Globe Ins. Co.* (C. C.) 175 Fed. 508, affirmed in 178 Fed. 161, 101 C. C. A. 481, 21 Ann. Cas. 844, the policy which covered a saw mill and electric light plant required that at all times when the property remained "idle or inoperative" a constant day and night watchman should be kept on duty, and that, if the property was idle or "shut down" for more than 30 days at a time, permission should be obtained and indorsed on the policy. It was held that the words "idle or inoperative" should be construed as synonymous with "shut down," to mean a cessation of operation from the ordinary running of the plant, and not merely the usual shutting down for the night, or over Sunday, or on a holiday; and hence the policy was not broken by the insured's failure to keep a watchman on duty while the plant was temporarily shut down over Sunday.

1809-1810. (k) Same—Temporary absence

1810 (k). The absence of the sole watchman from a boat to secure a change of clothing and without the owner's knowledge, during which absence the boat burned, was a material breach of the owner's warranty, under a fire policy, that the boat should "at all times have a competent watchman on board"

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(Whealton Packing Co. v. Ætna Ins. Co., 185 Fed. 108, 107 C. C. A. 113, 34 L. R. A. [N. S.] 563).

Burden is on insurer to show that watchman was not on duty as required by warranty, or that he was remiss in his duty (St. Paul Fire & Marine Ins. Co. of St. Paul, Minn., v. Kendle, 163 Ky. 146, 173 S. W. 373); and in the same case it was stated that whether watchman on ferryboat was "on duty," within warranty of fire policy, though not awake at all hours, was for the jury.

1812-1813. (n) Same—Effect of breach of condition

1812 (n). Where a marine policy on a canal boat contained a provision that it was "warranted by the insured that the said vessel * * * shall at all times have a competent watchman on board," and she sunk at a dock, during the absence of the master and crew, without any person in charge, insurer was not liable (Snyder v. Home Ins. Co., 148 Fed. 1021, 79 C. C. A. 536, affirming [D. C.] 133 Fed. 848).

Insured's failure to comply with watchman's warranty does not limit the insurer to an enforcement of the penalty provided for its violation, but entitles it to forfeit the policy (Frick v. Millers' Nat. Ins. Co. [Mo.] 184 S. W. 1161).

Under Insurance Code Wash. 1911 (Laws 1911, c. 49) § 34, providing that a breach of warranty shall not avoid the policy unless it contributed to the loss, the failure of a watchman to report to the central station every hour, as required by the policy, does not avoid the policy, where he promptly turned in the alarm (E. H. Stanton Co. v. Rochester German Underwriters' Agency [D. C.] 206 Fed. 978).

19. BREACH OF "IRON-SAFE CLAUSE" AS GROUND OF FORFEITURE

1813-1814. (a) Nature and purpose of "iron-safe clause"

1814 (a). The purpose and object of the iron-safe clause is to facilitate the accurate ascertainment of the extent of the loss.

Continental Ins. Co. v. Rosenberg, 7 Pennewill (Del.) 174, 74 Atl. 1073;
Phoenix Ins. Co. v. Sherman, 110 Va. 435, 66 S. E. 81; Houff &
Holler v. German-American Ins. Co., 110 Va. 585, 66 S. E. 831.

It is a reasonable condition, valid and binding on the assured, in the absence of fraud.

Day v. Home Ins. Co., 177 Ala. 600, 58 South. 549, 40 L. R. A. (N. S.)
652; Capital Fire Ins. Co. v. Kaufman, 91 Ark. 310, 121 S. W.

289; *Continental Ins. Co. v. Rosenberg*, 7 Pennewill (Del.) 174, 74 Atl. 1073; *Hartford Fire Ins. Co. v. Hollis*, 58 Fla. 268, 50 South. 985; *Reynolds v. German-American Ins. Co.*, 107 Md. 110, 68 Atl. 262, 15 L. R. A. (N. S.) 345; *King v. Concordia Fire Ins. Co.*, 140 Mich. 258, 103 N. W. 616, 6 Ann. Cas. 87; *Coggins v. Aetna Ins. Co.*, 144 N. O. 7, 58 S. E. 506, 8 L. R. A. (N. S.) 839, 119 Am. St. Rep. 924; *Gish v. Insurance Co. of North America*, 87 Pac. 869, 16 Okl. 59, 13 L. R. A. (N. S.) 826; *Shawnee Fire Ins. Co. v. Thompson & Rowell*, 30 Okl. 466, 119 Pac. 985; *Springfield Fire & Marine Ins. Co. v. Halsey*, 34 Okl. 383, 126 Pac. 237; *Scottish Union & Nat. Ins. Co. v. Virginia Shirt Co.*, 113 Va. 353, 74 S. E. 228.

Where the act prescribing a standard form of policy is unconstitutional, the insertion in a policy of the iron-safe clause is valid, notwithstanding a statute prohibits the issuance of policies except in accordance with the standard form. *King v. Concordia Fire Ins. Co.*, 140 Mich. 353, 103 N. W. 616, 6 Ann. Cas. 87.

An application, wherein applicant agrees that he will preserve his last inventory in an iron safe at night, or in some place secure against fire in another building, authorizes an iron-safe clause in the policy issued thereon extending to the last inventory, but not also to books of account (*German American Ins. Co. v. Darin*, 80 Kan. 578, 103 Pac. 87).

The clause applies only to insurance on stocks of merchandise, and this is true though other classes of property are included in the policy.

Traders' Ins. Co. v. Letcher, 143 Ala. 400, 39 South. 271; *Queen of Arkansas Ins. Co. v. Dillard*, 96 Ark. 376, 131 S. W. 946; *American Ins. Co. v. Bagley*, 6 Ga. App. 736, 65 S. E. 787.

Consequently the clause will not apply in a policy on household goods (*Traders Ins. Co. v. Letcher*, 143 Ala. 400, 39 South. 271), or in a policy on a job printing establishment, where insured kept no stock on hand for use or sale (*Queen of Arkansas Ins. Co. v. Dillard*, 96 Ark. 376, 131 S. W. 946). So, too, the phrase "other personal property" in the iron-safe clause of a policy, requiring that the clause shall be complied with if the insurance covers merchandise or other personal property, means articles in the nature of merchandise, and does not include ordinary store fixtures such as show cases, iron safes, etc. (*American Ins. Co. v. Bagley*, 65 S. E. 787, 6 Ga. App. 736).

In the absence of a condition or agreement imposing on insured the duty of keeping his books of account in an iron safe, or to preserve them in some other safe place, requested instructions, in an action

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a journal was destroyed by fire is such a slight technical violation of a promissory warranty to keep and produce a complete set of books that it should not work a forfeiture (*Dickey v. Springfield Fire & Marine Ins. Co. of Springfield, Mass.* [Okl.] 156 Pac. 204). The clause is complied with by insured's production of his last inventory and next preceding one, with complete set of books from last inventory to fire (*Springfield Fire & Marine Ins. Co. v. Griffin* [Okl.] 166 Pac. 431). But there is not a substantial compliance where insured merely kept an inventory in a place of safety and loose sheets showing partial receipts of business (*Cohen v. Home Ins. Co.* [Del. Super.] 97 Atl. 1014).

Where fire policy required inventory within 30 days unless taken within one year prior to insurance, and that insured should keep books with record from date of inventory, failure to have such inventory and books at time of fire, 30 days after insurance, did not necessarily prevent recovery. *Polizzi v. Commercial Fire Ins. Co.*, 255 Pa. 297, 99 Atl. 907.

1819 (c). It has been held in Kansas that in an action to recover on an insurance policy, plaintiff must plead and prove the performance of all conditions precedent, or a waiver by the insured (*Shawnee Fire Ins. Co. v. Knerr*, 83 Pac. 611, 72 Kan. 385, rehearing denied 83 Pac. 613, 72 Kan. 389). Where the answer denies the allegations of the petition showing full performance by plaintiff, and specially pleads failure to observe the iron-safe clause, the burden is on plaintiff to show compliance with such clause (*Johnson v. Mercantile Town Mut. Fire Ins. Co.*, 96 S. W. 697, 120 Mo. App. 80).

The sufficiency of the evidence to show a breach of the iron-safe clause is considered in *Queen Ins. Co. of America v. Vines*, 174 Ala. 568, 57 South. 444; *German American Ins. Co. v. Fuller*, 110 Pac. 763, 28 Okl. 722.

The question whether the iron-safe clause in a policy has been complied with is a question of fact for the jury.

Yates v. Thomason, 83 Ark. 126, 102 S. W. 1112; *McMillan & Son v. Insurance Co. of North America*, 78 S. C. 433, 58 S. E. 1020, 1135.

An instruction that a substantial compliance with the iron-safe clause was required, and that if by accident books should be lost without insured's design, if there still remained means of fully ascertaining the value of the stock, so that the insurer has suffered no disadvantage, the loss would not vitiate the policy, was not objec-

tionable as meaning that a failure to comply substantially with the clause would not defeat the policy if the loss resulted, not from design, but accident (*McMillan & Son v. Insurance Co. of North America*, 78 S. C. 433, 58 S. E. 1020, 1135).

1819-1821. (d) Taking and keeping inventory

1819 (d). The iron-safe clause often provides that an inventory must be taken within a certain specified time. It is, of course, obvious that there is a breach of the condition if the inventory is not taken within the time so specified, though after the loss has occurred an inventory approximately correct may be made from the books (*St. Landry Wholesale Mercantile Co. v. New Hampshire Fire Ins. Co.*, 38 South. 87, 114 La. 146, 3 Ann. Cas. 821).

And to the same effect is *Hartford Fire Ins. Co. v. Farris*, 116 Va. 880, 83 S. E. 377; *Hartford Fire Ins. Co. v. Adams* (Tex. Civ. App.) 158 S. W. 231; *Cohen v. Home Ins. Co.* (Del. Super.) 97 Atl. 1014.

Where a policy provides for an inventory of the stock covered at least once a year during the life of the policy, the insured has a year from the date of the policy to make the inventory, though it runs only for a year (*Tucker v. Colonial Fire Ins. Co.*, 51 S. E. 86, 58 W. Va. 30). It is not, however, essential that each inventory be taken exactly twelve months after the preceding one, but there is a sufficient compliance where inventories were taken in April, 1901, and February, 1902; the fire occurring June 21, 1903.

Newton v. Theresa Village Mut. Fire Ins. Co., 104 N. W. 107, 125 Wis. 289.

1820 (d). A common form of the clause is that the insured shall take a complete itemized inventory of the stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve months prior to the policy one shall be taken within thirty days after its issuance. There can, of course, be no breach of the clause until the expiration of such 30 days (*Royal Ins. Co. v. W. P. Wright & Co.* [Tex. Civ. App.] 148 S. W. 824). The time must be computed from date of delivery to the insured, not from date of the policy (*Homestead Fire Ins. Co. v. Ison*, 110 Va. 18, 65 S. E. 463).

So, where a fire occurred within thirty days after a policy was issued and an iron-safe clause therein allowed thirty days for making the inventory and the opening of books which were required to be kept in the safe, there was no breach of such iron-safe

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clause (*W. P. Parker & Co. v. Continental Ins. Co.*, 55 S. E. 717, 143 N. C. 339).

Where fire insurance policy required inventory within thirty days from insurance unless inventory had been taken within year prior thereto, and that insured should keep books with record from date of inventory, his failure to have such inventory and books at time of fire, thirty days after insurance, did not necessarily prevent recovery. *Polizzi v. Commercial Fire Ins. Co.*, 255 Pa. 297, 99 Atl. 907.

Under such a clause, if no inventory has been taken within a year preceding the issuance of the policy and none is taken within thirty days thereafter, the policy is forfeited.

Reynolds v. German American Ins. Co., 107 Md. 110, 68 Atl. 262, 15 L. R. A. (N. S.) 345; *Dorroh-Kelly Mercantile Co. v. Orient Ins. Co.*, 104 Tex. 199, 135 S. W. 1165, affirming 59 Tex. Civ. App. 289, 126 S. W. 616; *German Ins. Co. v. Beville* (Tex. Civ. App.) 126 S. W. 31.

The clause also provides that the inventory thus taken and "the last preceding inventory," if such there is, shall be kept, etc. The term "last preceding inventory" refers to inventories taken under the contract of insurance (*Arnold v. Indemnity Fire Ins. Co.*, 152 N. C. 232, 67 S. E. 574). The requirement is met where insured took and preserved a new inventory, on discovering that part of one taken a few months previously had been destroyed, though he did not preserve the remaining part of the old inventory (*Arkansas Ins. Co. v. McManus*, 86 Ark. 115, 110 S. W. 797).

In *Queen City Ins. Co. v. Long* (Tex. Civ. App.) 132 S. W. 82, it was held to be, under the evidence, a question for the jury whether the inventory of stock that was made just prior to the assured's alleged acceptance of the policy, or whether the inventory taken prior to the date on which the policy was received by assured was the "last preceding inventory," the former inventory being the preceding one if the policy was not accepted until when alleged, otherwise the latter was the last preceding inventory.

An invoice of goods purchased is not an inventory within the meaning of the clause.

Day v. Home Ins. Co., 177 Ala. 600, 58 South. 549, 40 L. R. A. (N. S.) 652; *Phoenix Ins. Co. v. Dorsey*, 102 Miss. 81, 58 South. 778. And see *Coggins v. Aetna Ins. Co.*, 144 N. C. 7, 56 S. E. 506, 8 L. R. A. (N. S.) 839, 119 Am. St. Rep. 924; *Hartford Fire Ins. Co. v. Adams* (Tex. Civ. App.) 158 S. W. 231; *Mechanics' & Traders' Ins. Co. v. Davis* (Tex. Civ. App.) 167 S. W. 175; *Hartford Fire Ins. Co. v. Farris*, 116 Va. 880, 83 S. E. 377.

However, the invoice of the first lot of goods put into a new stock of goods at about the time of the issuance of the policy, giving the quantities thereof by items, with the cost prices, will constitute a sufficient inventory (*Ruffner Bros. v. Dutchess Ins. Co.*, 53 S. E. 943, 59 W. Va. 432, 115 Am. St. Rep. 924, 8 Ann. Cas. 866). In *Queen of Arkansas Ins. Co. v. Forlines*, 94 Ark. 227, 126 S. W. 719, it appeared that the insured had only been in business for a month before the fire during which time he had received his goods from time to time from the wholesalers by dray, and duplicate itemized invoices were made with each consignment, one of which was given to insured, and the duplicate was retained by the seller, and insured entered into a book from his copy the total of each consignment with the date and name of the seller. Insured's copies of the invoices were destroyed by the fire. It was held that the entries in insured's book, together with the duplicate invoices, which were in possession of the sellers, were a substantial compliance with the provision requiring an inventory under Kirby's Dig. § 4375a, making substantial compliance by insured with the terms and covenants of fire policies on personalty sufficient.

If the insurer directs the insured to keep and produce invoices, invoices of goods purchased since the last inventory, and produced as required, comply with the requirement (*Continental Ins. Co. v. Rosenberg*, 7 Pennewill [Del.] 174, 74 Atl. 1073).

1821 (d). In determining what constitutes an inventory, all parts of the iron-safe clause should be read and considered together (*Ruffner Bros. v. Dutchess Ins. Co.*, 53 S. E. 943, 59 W. Va. 432, 115 Am. St. Rep. 924, 8 Ann. Cas. 866). Generally speaking, an inventory within the meaning of the term as used in the iron-safe clause, is a list of all the merchandise in the stock, sufficiently itemized to show the kinds and quantities thereof, together with their value at the time of making the same, as nearly as it can be ascertained.

Continental Ins. Co. v. Rosenberg, 7 Pennewill (Del.) 174, 74 Atl. 1073;
Miller v. Home Ins. Co. of New York, 127 Md. 140, 96 Atl. 267;
Shawnee Fire Ins. Co. v. Thompson & Rowell, 30 Okl. 466, 119 Pac. 985; *Scottish Union & Nat. Ins. Co. v. Virginia Shirt Co.*, 113 Va. 353, 74 S. E. 228; *Ruffner Bros. v. Dutchess Ins. Co.*, 59 W. Va. 432, 53 S. E. 943, 115 Am. St. Rep. 924, 8 Ann. Cas. 866.

A list of goods showing their value as first placed in the store is a sufficient inventory. *Phenix v. American Cent. Ins. Co.*, 106 Miss. 145, 63 South. 346.

It is not, however, absolutely essential that the values be stated, if they can be easily ascertained from the statement of grades and brands (*Kline Bros. & Co. v. Royal Ins. Co.* [C. C.] 192 Fed. 378). The clause does not require that the cost or value of the articles listed both in detail and in total be shown (*Hartford Fire Ins. Co. v. Walker* [Tex. Civ. App.] 153 S. W. 398). It is, nevertheless, obvious that a mere summary taken from the general footings of an itemized inventory not preserved (*Houff & Holler v. German American Ins. Co.*, 110 Va. 585, 66 S. E. 831), or one which merely lumps the merchandise together without itemizing the same, is not an inventory within the clause.

Shawnee Fire Ins. Co. v. Thompson & Rowell, 80 Okl. 466, 119 Pac. 985; *Phoenix Ins. Co. v. Sherman*, 110 Va. 435, 66 S. E. 81.

But where the inventory contains a description and itemized valuation of the principal articles of the stock the mere fact that a certain line of articles is valued in the aggregate rather than by items will not forfeit the policy (*Arnold v. Indemnity Fire Ins. Co. of New York*, 152 N. C. 232, 67 S. E. 574).

An inventory is not a compliance with the requirement if it does not contain substantially all the articles embraced in the stock at the time, and an intentional failure to inventory from one-tenth to one-fifth of the value of the stock then valued at about \$22,000 breached the provisions of the iron-safe clause, so as to prevent recovery on the policy (*Orient Ins. Co. v. Dorroh-Kelly Mercantile Co.*, 59 Tex. Civ. App. 289, 126 S. W. 616, affirmed 104 Tex. 199, 135 S. W. 1165). However, the fact that a few sheets are missing from an inventory is not a valid objection thereto, there being otherwise a substantial compliance (*Arkansas Mut. Fire Ins. Co. v. Woolverton*, 82 Ark. 476, 102 S. W. 226). And a failure to list about one-ninth of the stock by items does not render the inventory insufficient to authorize a recovery of \$23,000, where the stock, properly inventoried, amounted to \$42,000 (*Hanover Fire Ins. Co. v. Eisman*, 45 Okl. 639, 146 Pac. 214).

The provision of a fire policy on lumber that insured should take a complete inventory of stock is met by inventory showing number of pieces of lumber and dimensions of each piece of different kinds and total number of each kind separately without showing the class or value (*Camden Fire Ins. Co. v. Yarbrough* [Tex. Civ. App.] 182 S. W. 66). An inventory which gives the items and aggregate num-

ber of feet in each pile of lumber is sufficient (Royal Ins. Co. of Liverpool v. Morgan, 122 Ark. 243, 183 S. W. 198).

Clause of fire policy on cut telegraph poles, requiring assured to take complete itemized inventory once a year, was inapplicable to standing timber which had not been converted. *Eaton v. Globe & Rutgers Fire Ins. Co.*, 227 Mass. 354, 116 N. E. 536.

In *Prudential Fire Ins. Co. v. Alley*, 104 Va. 356, 51 S. E. 812, the assured took an inventory of his stock June 10th. Subsequently he shipped the goods to another town and commenced business there, and the policy was issued June 25th, insuring the goods and the building in which they were placed. The inventory embraced articles not shipped to the new place of business, but these were accounted for as if sold for cash. It was held that the inventory sufficiently complied with the policy.

Where the only objection as to an inventory is that part of it was in Hebrew, it not being stated what portion thereof was in such language, and it not appearing from the record that any portion of the inventory was in Hebrew, such complaint is without merit. *Ætna Ins. Co. v. Lipsitz*, 60 S. E. 531, 130 Ga. 170, 14 Ann. Cas. 1070.

The keeping and production of a record from which the amount and values of insured cotton contained in the building destroyed could be reasonably ascertained held a substantial compliance with a provision of the policy requiring that a faithful record of all cotton be kept and produced (*Royal Ins. Co. v. Scritchfield* [Okla.] 152 Pac. 97).

1821-1825. (e) Keeping books of account

1821 (e). The iron-safe clause provides that the insured shall "keep a set of books, showing a complete record of business transacted, including all purchases and sales, both for cash and credit." A failure to comply with this requirement will, of course, forfeit the policy.

Home Ins. Co. of New York v. Williams, 237 Fed. 171, 150 C. C. A. 317; *German Ins. Co. v. Bevill* (Tex. Civ. App.) 126 S. W. 31; *Home Ins. Co. v. Rogers*, 60 Tex. Civ. App. 456, 128 S. W. 625.

The provision of fire insurance policy requiring insured to keep a complete set of books, presenting complete record of his business, is satisfied, if insured can produce them when demanded (*Palatine Ins. Co. v. Whitfield* [Fla.] 74 South. 869). The purpose of an iron-

safe clause is accomplished where insured produced data from which the value could be ascertained, and kept books showing the firm's business, though he failed to produce the books because they were destroyed by fire at a place where he had a right to keep them (*Dickey v. Springfield Fire & Marine Ins. Co. of Springfield, Mass.*, [Okl.] 156 Pac. 204).

1822 (e). It seems to be well settled as a general principle that the provision as to taking inventory and the provision as to keeping books of account must be read together, and that there is a substantial compliance if the keeping of books is begun when the inventory is taken.

Bray & Franklin v. Virginia Fire & Marine Ins. Co., 139 N. C. 390, 51 S. E. 922; *Homestead Fire Ins. Co. v. Ison*, 110 Va. 18, 85 S. E. 463; *Phoenix Ins. Co. v. Sherman*, 110 Va. 435, 86 S. E. 81. But see *Carp v. Queen Ins. Co.*, 116 Mo. App. 528, 92 S. W. 1137, holding that books must be kept from the issuance of the policy and not merely from the taking of an inventory.

Thus, it was held in *Bray & Franklin v. Virginia Fire & Marine Ins. Co.*, 139 N. C. 390, 51 S. E. 922, that the failure to keep books did not defeat a recovery on the policy, where the loss occurred within 30 days from the date of the policy and no inventory had been taken.

The provision as to keeping books of account requires that the insured shall keep such books in such manner as that they shall constitute a record of business transactions, which a person of ordinary intelligence accustomed to accounts can understand.

Penix v. American Cent. Ins. Co., 106 Miss. 145, 63 South. 346; *German American Ins. Co. v. Fuller*, 26 Okl. 722, 110 Pac. 763; *Shawnee Fire Ins. Co. v. Thompson & Rowell*, 30 Okl. 466, 119 Pac. 985. And see *Continental Ins. Co. v. Rosenberg*, 7 Pennewill (Del.) 174, 74 Atl. 1073; *Springfield Fire & Marine Ins. Co. v. Halsey* (Okl.) 153 Pac. 145; *Springfield Fire & Marine Ins. Co. v. Hays & Son* (Okl.) 156 Pac. 673, L. R. A. 1917A, 1078; *Queen Ins. Co. of America v. Dalrymple* (Okl.) 158 Pac. 1154.

It is not necessary that the books should be kept according to any particular system, or that they should be such a scientific system of books as would satisfy an expert accountant (*Beaird v. New Jersey Plate Glass Co.*, 157 Ill. App. 1). It is a sufficient compliance with the clause as to the keeping of books, if from the books kept by the insured, with the assistance of those who understand the system on which they were kept, the amount of purchases and

sales can be ascertained, and cash transactions distinguished from those on credit.

Queen of Arkansas Ins. Co. v. Malone, 111 Ark. 229, 163 S. W. 771;
Ætna Ins. Co. v. Lipsitz, 130 Ga. 170, 60 S. E. 531, 14 Ann. Cas. 1070; *Phoenix Ins. Co. of Hartford v. Bourgeois*, 105 Miss. 698, 63 South. 212; *Prudential Fire Ins. Co. v. Alley*, 51 S. E. 812, 104 Va. 356.

Occasional errors and omissions will not render the books insufficient.

Fields v. German American Ins. Co., 140 Mo. App. 158, 120 S. W. 697;
Same v. Queen Ins. Co., 140 Mo. App. 168, 120 S. W. 700.

Policies of burglary insurance contain a clause relieving the insurer from liability if the books and accounts are not so kept that the actual loss may be ascertained. Under this clause, though the manner of keeping accounts may be crude and informal, yet the requirement is fulfilled if the statements therein contained are accurate, and will show the amount of money actually kept in a safe, and from them a loss occasioned by burglary ascertained (*Beaird v. New Jersey Plate Glass Co.*, 157 Ill. App. 1). So, where plaintiffs kept a book of account and invoices of goods purchased, it was proper to consider both the book and the invoices in determining whether "the books and accounts" so kept were of the character required by the clause (*Schwartz v. Metropolitan Surety Co.* [Sup.] 113 N. Y. Supp. 66). A failure to keep books and accounts so that the actual loss can be ascertained will, of course, forfeit the policy.

Pearlman v. Metropolitan Surety Co., 111 N. Y. Supp. 882, 127 App. Div. 539; *Rosenberg v. People's Surety Co. of New York*, 125 N. Y. Supp. 257, 140 App. Div. 436.

A book wherein the owner of a pool hall entered the amounts of money taken in, amounts paid out, and the amounts placed in the safe each day, was a compliance with his policy of burglary insurance requiring him to keep books showing the money on hand (*Gueringer v. Fidelity & Deposit Co. of Maryland* [Mo. App.] 184 S. W. 936). A burglary insurance policy, requiring accounts to be so kept that the loss might be accurately determined, is complied with by production of original invoices, inventory, merchandise account book, showing goods purchased from inventory to burglary, and cash book, showing cash sales during the same time (*Georgia Life Ins. Co. v. Friedman*, 105 Miss. 789, 63 South. 214).

Mode of accounting of holders of policy of burglary insurance on stock of goods regarded as sufficient compliance with requirement of

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policy that insured should not be liable if accounts of insured were not so kept that actual loss could be accurately determined therefrom. *Horwitz v. United States Fidelity & Guaranty Co.*, 95 Wash. 455, 164 Pac. 77.

1823 (e). In order that there shall be a substantial compliance with the clause relating to the keeping of books, the books should cover the entire period (*Chamberlain v. Shawnee Fire Ins. Co.*, 177 Ala. 516, 58 South. 267). They should, of course, show with reasonable certainty a complete record of the insured's business transactions, including purchases and sales for cash or credit. So far as purchases are concerned, preserving and filing the original bills of goods purchased is a sufficient compliance, as regards purchases, with the provision of a fire policy that insured shall keep a set of books presenting a complete record of business transacted (*Carp v. National Assur. Co.* [Mo. App.] 99 S. W. 523). But where a merchandise account was kept as showing goods purchased, the aggregate amount of the whole being \$558.87, and where some of the items stated the character of the goods and their price, but there were other items aggregating in amount nearly one-half of the whole sum, which merely stated the name of some person or firm, with the added word "bill," and an amount, in the absence of any other evidence to show that there was in this regard a compliance with the requirement as to keeping books, it does not on its face appear to meet the requirement of a fire policy to keep a set of books showing the business transacted (*Ætna Ins. Co. v. Johnson*, 56 S. E. 643, 127 Ga. 491, 9 L. R. A. [N. S.] 667, 9 Ann. Cas. 461).

A set of books showing complete inventory before date of policy, goods purchased thereafter, and an account of daily sales, though not showing items sold nor distinguishing between cash and credit sales, is substantial compliance with iron-safe clause in standard fire policy (*Pauley v. Sun Ins. Office* [W. Va.] 90 S. E. 552). A book, showing "all purchases and sales both for cash and credit" within a warranty in a policy of insurance, does not include a ledger showing the amount of cash deposited at intervals of from one to four days after deducting all expenses of the business for each day preceding the fire (*Wadleigh v. Home Ins. Co.*, 38 Okl. 316, 132 Pac. 1111). Books showing an itemized scale of the logs sawed and original invoices of the lumber shipped out, where testimony was that lumber averaged 20 per cent. more than the logs scaled, was a substantial compliance under the statute with a fire insurance policy requiring the assured to keep a complete set of books (*Royal*

Ins. Co. of Liverpool v. Morgan, 122 Ark. 243, 183 S. W. 198). Removal by insured of a considerable portion of the insured merchandise to another place of business, and failure to have the transaction entered on his books of account, invalidated the policy (Governale v. Interstate Fire Ins. Co. of Birmingham, Ala., 141 La. 133, 74 South. 791).

As to the sales for cash, the failure of the insured to keep an account of his cash sales will forfeit the policy.

Johnson v. Mercantile Town Mut. Fire Ins. Co., 120 Mo. App. 80, 96 S. W. 697; Shawnee Fire Ins. Co. v. Thompson & Rowell, 30 Okl. 466, 119 Pac. 985; Scottish Union & National Ins. Co. v. Weeks Drug Co., 55 Tex. Civ. App. 263, 118 S. W. 1086; Houff & Holler v. German American Ins. Co., 110 Va. 585, 66 S. E. 831.

But it does not seem to be necessary that an itemized account of cash sales should be kept, and it is regarded as sufficient if the books show the amount of the daily sales.

Security Mut. Ins. Co. v. Woodson, 79 Ark. 266, 95 S. W. 481, 116 Am. St. Rep. 75; Arkansas Mut. Fire Ins. Co. v. Woolverton, 82 Ark. 476, 102 S. W. 226; Arkansas Mut. Life Ins. Co. v. Stuckney, 106 S. W. 203, 85 Ark. 33; Arkansas Ins. Co. v. McManus, 86 Ark. 115, 110 S. W. 797; Prudential Fire Ins. Co. v. Alley, 51 S. E. 812, 104 Va. 356.

1824 (c). Where the insured sold coupons redeemable in goods, it was proper to enter the sales of the coupons, and not the sales of the goods when paid for in coupons.

Fields v. German-American Ins. Co., 140 Mo. App. 158, 120 S. W. 697; Same v. Queen Ins. Co., 140 Mo. App. 168, 120 S. W. 700.

So, too, where a small store was conducted in connection with a lumber business and tickets were given to employes for sums due them for work, which were treated as cash at the store, it was proper to enter purchases on such tickets as cash sales (Ætna Ins. Co. v. Johnson, 127 Ga. 491, 56 S. E. 643, 9 L. R. A. [N. S.] 667, 9 Ann. Cas. 461). But the requirement that insured keep a set of books clearly presenting a record of all sales and purchases is not complied with by the preservation of slips from a cash register.

Monger & Henry v. Queen Ins. Co. of America, 44 Tex. Civ. App. 629, 99 S. W. 887; Henry v. Green Ins. Co. of America (Tex. Civ. App.) 103 S. W. 836.

Policy provision as to keeping books, is not complied with by making memorandum on slips of paper and entering them weekly and pre-

serving account of only those purchases for which there were invoices. *Boulanger v. British Underwriters*, 141 La. 461, 75 South. 207.

In *Phoenix Ins. Co. v. Sherman*, 110 Va. 435, 66 S. E. 81, it was held that where insured, conducting a large business and making sales daily for both cash and credit does not in his books make entries indicating what the cash received was for, and mingles the proceeds of the credit sales with the proceeds of the cash sales, and the insured, relying on his cash book, the entries of which were alleged to have been made after daily sales, is unable to explain intelligently what business he had transacted or what goods were in the store and destroyed by the fire, and a destroyed ledger from which it was claimed some of the cash book entries were taken failed to show the date of the entries, and the cash book was so written up that it might have been written after the fire, the books were not sufficient within the policy, even as a substantial compliance therewith.

In *Royal Exchange Assur. of London, Eng. v. Rosborough* (Tex. Civ. App.) 142 S. W. 70, it appeared that insurance certificates covering cotton in storage required the insured to keep a set of books showing a complete daily record of the date at which each bale of cotton covered was purchased or received, from whom purchased or received, in what warehouse, compress, or yard stored, together with the original tag number or mark thereon with its weight and classification, and a complete daily record of all shipments, or sales, etc. It was held that where plaintiff's record showed no classification of the cotton covered except as the same might be ascertained from the price per pound paid therefor in connection with the market price on the day of the purchase, and the custom of price variation above or below market as the cotton was above or below middling grade, there was no sufficient compliance with the provision requiring classification, which precluded a recovery on the policies.

A record of credit sales only is not a compliance with the clause (*Johnson v. Mercantile Town Mut. Fire Ins. Co.*, 120 Mo. App. 80, 96 S. W. 697); nor is a record of credit sales combined with a bank book showing deposits, where there is no discrimination between deposits by the firm and deposits by one of the members of the firm in his individual capacity (*Houff & Holler v. German American Ins. Co.*, 110 Va. 585, 66 S. E. 831); nor a small pocket ledger, showing the amount of cash deposited in bank after deducting all expenses of the business and covering only a short period

of time (*Shawnee Fire Ins. Co. v. Thompson & Rowell*, 30 Okl. 406, 119 Pac. 985). But the fact that a few credit items are not shown does not render the books insufficient, where there is otherwise substantial compliance. *Scottish Union & National Ins. Co., of Edinburgh v. Andrews & Matthews*, 40 Tex. Civ. App. 184, 89 S. W. 419. Where insured was in the produce business handling large quantities of eggs, which in part were kept in cold storage, he must keep his books so as to show what eggs were removed from his store and placed in cold storage. *Teutonia Ins. Co. v. Tobias* (Tex. Civ. App.) 145 S. W. 251.

In *Home Ins. Co. v. Rogers*, 60 Tex. Civ. App. 456, 128 S. W. 625, the insured shipped goods from his stock amounting to \$578, and no entry of such shipments was made in his books, but there was evidence that insured kept a list of the goods shipped. Act of March 27, 1903 (Acts 28th Leg. c. 69) Sayles' Ann. Civ. St. Supp. 1897-1904, art. 3096aa, provides that any provision in any contract of insurance which provides that the answers or statements made in the application for such contract of insurance, if untrue, shall render the policy void, shall be of no effect, unless it be shown that the matter or thing misrepresented was material to the risk, or actually contributed to the contingency or event on which said policy became due and payable, and whether it was material and so contributed shall be a question of fact for the court or jury trying such case. It was held that the statute did not apply to the provision as to keeping books, and that a verdict should have been directed for defendant.

The sufficiency of the evidence to show a substantial compliance with the clause as to keeping books is considered in *Security Mut. Ins. Co. v. Woodson*, 79 Ark. 266, 95 S. W. 481, 116 Am. St. Rep. 75.

It is a question for the jury whether insured substantially complied with a clause requiring them to keep books to show the state of their business. *McMillan & Son v. Insurance Co. of North America*, 58 S. E. 1020, 78 S. C. 433; *Id.*, 78 S. C. 433, 58 S. E. 1135.

1825-1829. (f) Keeping books and papers in fireproof safe

1825 (f). The iron safe clause provides that the inventory and books of account shall be securely kept in a fireproof safe at night and at all times when the store is not actually open for business, or in some secure place not exposed to a fire which would destroy the building where the business is carried on. As the purpose of the provision is to secure the preservation of the books and papers required to be produced after the fire, in order that the loss may be ascertained, the actual method of this preservation is immaterial,

and if they were actually preserved and produced it is not essential that they should have been kept in a safe.

Dodge v. Thomason, 94 Ark. 21, 125 S. W. 648; *Continental Ins. Co. v. Rosenberg*, 7 Pennewill (Del.) 174, 74 Atl. 1073; *Palatine Ins. Co. v. Whitfield* (Fla.) 74 South. 869.

But see *Penix v. American Cent. Ins. Co.*, 106 Miss. 346, 63 South. 346, holding that there was no compliance with a clause requiring books to be kept in a place not exposed to fire that would destroy the building, where books were kept under the proprietor's pillow at night.

So it has been held that if, in accordance with the custom of the stores in a rural community, insured on Saturday nights closed his store between 10 and 11 o'clock, and took his books upstairs to his room to post them, and he was doing so at the time of the fire, the books being otherwise kept in an iron safe at all times, when the store was closed, whether insured's acts constituted a sufficient compliance with an iron-safe clause in his policy was for the jury (*Capital Fire Ins. Co. v. Kaufman*, 91 Ark. 310, 121 S. W. 289).

1826 (f). If the insured, in good faith, placed the books in a safe which he believed to be fire proof, or in some place which he had a right to believe was not exposed to fire, the requirement was met (*Joffe & Maukowitz v. Niagara Fire Ins. Co. of New York*, 116 Md. 155, 81 Atl. 281, 51 L. R. A. [N. S.] 1047, Ann. Cas. 1913C, 1217).

In determining whether the place of business is or is not "open for business," within the meaning of the clause, the insurance company is bound by the custom of the community as to what constitutes the usual and customary hours of business. So, where it appeared that it was the custom of the stores in the community to keep open until 10 or 11 o'clock, and then for the proprietor to take his books upstairs to his room, and post them before returning them to the safe in the store, as plaintiff was doing on the night of the fire, the court properly charged that the jury should consider such custom in determining whether there had been a compliance with the iron-safe clause (*Capital Fire Ins. Co. v. Kaufman*, 91 Ark. 310, 121 S. W. 289). And in *Major v. Insurance Co. of North America*, 112 Mo. App. 235, 86 S. W. 883, it was held that, where insured was in the habit of keeping his store open for business until 11 or 12 o'clock at night, the policy did not require that such books should be placed in his safe during his temporary absence from the store at about 9 o'clock on the evening of the fire, answering a professional

call, as a physician, about a block distant from the store. On the other hand, in *Joffe & Maukowitz v. Niagara Fire Ins. Co. of New York*, 116 Md. 155, 81 Atl. 281, 51 L. R. A. (N. S.) 1047, Ann. Cas. 1913C, 1217, it was held that where the store was locked for a half hour at noon while the persons in charge were at lunch, and during that time the property was destroyed by fire, the store was not then "open for business," within a provision of the iron-safe clause. The condition is violated by failure to place books in a safe place while insured was home for dinner and while store was locked (*Merchants' & Bankers' Fire Underwriters v. Foster* [Tex. Civ. App.] 192 S. W. 811). A retail store was not "actually open for business," during the time the store was closed and the doors locked and the proprietor was in another part of the city, so that business could not be done while he was away (*Penix v. American Cent. Ins. Co.*, 106 Miss. 145, 63 South. 346).

1827 (f). In *Ætna Ins. Co. v. Mount*, 90 Miss. 642, 44 South. 162, 15 L. R. A. (N. S.) 471, the insured kept one set of books, presenting a record of the business. He subsequently adopted a new system, and the aggregate amount of the footings of the old books was brought forward in the new books. The old books were not kept in the safe, and were destroyed by a fire destroying the merchandise. It was held that insured failed to comply with the policy. But where the policy provides that the insured shall take an inventory once a year, and shall keep correct books of account, and keep the inventory and books in a fireproof safe, etc., the provisions for taking an inventory and keeping with it books of account should be construed together; and there was no default, on the part of the insured, in not keeping his books of account in a fireproof safe until the expiration of the time in which to take the inventory (*Hamann v. Nebraska Underwriters' Ins. Co.*, 82 Neb. 429, 118 N. W. 65). So, in *Carp v. National Assurance Co.* (Mo. App.) 99 S. W. 523, it was held that under a clause requiring (1) that insured shall make an inventory of stock on hand once a year, and unless such an inventory has been taken within a year prior to the date of the policy, one shall be taken within 30 days thereafter, (2) that he shall keep a set of books presenting a complete record of business transacted, from the date of inventory, as provided for in the first section of this clause, and during the continuance of this policy, and (3) that he will keep such books and inventory, and also the last preceding inventory, if such has been taken, in a safe, when the building is not open for business, the books of transactions pri-

or to an inventory, taken within a year after the inventory which was taken less than a year before the date of the policy, need not be preserved.

1828 (f). The mere fact that some one book or paper has been left out of the safe and destroyed will not forfeit the policy, if the books and papers preserved make it possible to ascertain the loss. Thus, where insured had taken an inventory about nine months before the fire and before the contract of insurance was entered into, and had taken an inventory about thirty days before the fire, the fact that the first inventory was inadvertently left out of the safe did not prevent recovery (*Arnold v. Indemnity Fire Ins. Co.*, 152 N. C. 232, 67 S. E. 574). And where the books produced show a proper record, there is sufficient compliance, though the journal was burned (*Royal Ins. Co. v. Okasaki* [Tex. Civ. App.] 177 S. W. 200). So it has been held that a rough inventory, taken in pencil, subject to correction, and afterwards to be copied in a book, is not the complete inventory required by the iron-safe clause to be kept in a fireproof safe, especially when the insured was not in default as to the taking of the inventory, and the insurance company could not have complained if no attempt had been made to take an inventory before the fire.

St. Landry Wholesale Mercantile Co. v. Teutonia Ins. Co., of New Orleans, 113 La. 1053, 1054, 37 South. 967; *Same v. Springfield Fire & Marine Ins. Co.*, 114 La. 1, 37 South. 988.

Similarly it has been held that where insured kept a merchandise account, which showed the amount of goods purchased by them, and an account of cash sales, which showed the goods sold, which books were produced in court in an action on the policy, and from these the goods destroyed by the fire could be ascertained, such books constituted a substantial compliance with an iron-safe clause in the policy, though an invoice book was left in the store at the time of the fire and burned (*People's Fire Ins. Ass'n of Arkansas, v. Gorham*, 95 S. W. 152, 79 Ark. 160). It was sufficient if insured, a retail merchant, kept books showing last inventory and all purchases and cash sales in an iron safe, notwithstanding occasional memoranda of short time credit filed in his desk until payment (*Houseman v. Globe & Rutgers Fire Ins. Co.*, 78 W. Va. 586, 89 S. E. 269). In *North British & Mercantile Ins. Co. v. Edmundson*, 104 Va. 486, 52 S. E. 350, the insured, who was a village undertaker, presented to the insurer an inventory, which was accepted as sufficient on the writing of the policy, and thereafter in an ordinary

manilla book, which contained the inventory, he entered all sales made by him and kept the same in an iron safe and produced it after the fire. He had made no purchases. He also kept a ledger, in which he made entries of certain business transactions, but which was kept in a desk and lost. It did not appear that such book contained any entry of transactions essential to an understanding of insured's business. It was held that the facts warranted a finding that there had been a substantial compliance with the iron-safe clause.

On the other hand, the clause was not complied with where insured, through carelessness, left his book showing the amount of sales in the building, and it was burned, and there was no other written evidence showing the amount of the sales, either credit or cash (*Yates v. Thomason*, 83 Ark. 126, 102 S. W. 1112). So, too, an insured who failed to preserve the last inventory before the issuance of the policy, except a summary thereof entered in a book, did not comply with the stipulations requiring him to keep in a fire-proof safe the last inventory before the issuance of the policy and to deliver the same to the insurer for examination after a loss (*Arkansas Ins. Co. v. Luther*, 109 S. W. 1022, 85 Ark. 579).

Of course, if the books and papers necessary to an ascertainment of the loss are not preserved, there is a breach of the clause, forfeiting the policy.

Arkansas Ins. Co. v. Luther, 85 Ark. 579, 109 S. W. 1022; *Powell v. Commonwealth Ins. Co.*, 60 S. E. 120, 3 Ga. App. 436; *Shawnee Fire Ins. Co. v. Knerr*, 83 Pac. 611, 72 Kan. 385, rehearing denied 83 Pac. 613, 72 Kan. 389; *Hammond v. Niagara Fire Ins. Co.*, 142 Pac. 936, 92 Kan. 851, L. R. A. 1915F, 759; *German American Ins. Co. v. Fuller*, 26 Okl. 722, 110 Pac. 763; *Shawnee Fire Ins. Co. v. Thompson & Rowell*, 30 Okl. 466, 119 Pac. 985; *Scottish Union & Nat. Ins. Co. v. Virginia Shirt Co.*, 113 Va. 353, 74 S. E. 228.

And the failure of the insured to preserve and produce the inventory called for by the iron-safe clause, in the absence of a showing by him that it was lost or destroyed without fault or negligence on his part, and not by mere failure to keep it in a safe, prevents recovery, though there is ample proof that the loss exceeded the insurance (*National Fire Ins. Co. v. J. W. Caraway & Co.*, 60 Tex. Civ. App. 566, 130 S. W. 458). And in the same case it was said that the Texas statute (Rev. St. 1895, art. 3096aa, as added by Laws 1903, c. 69) declaring that a provision in a contract of insurance, that misrepresentations therein or in the application therefor shall

render it void, shall not be a defense to an action on the contract, unless the misrepresentation was material or contributed to the contingency on which the policy became payable, has no application to a covenant in a policy to keep an inventory in an iron safe and produce it after fire. But the failure of the insured to preserve invoices, and keep them in a fireproof safe, does not operate as a forfeiture of the policy, if there was otherwise a substantial compliance with the clause and no demand was made for the production of the invoices (*Arkansas Mut. Life Ins. Co. v. Stuckney*, 106 S. W. 203, 85 Ark. 33).

The breach of a covenant in a policy that insured will keep its books in an iron safe is a defense in an action on the policy, and must be proved by defendant (*Kline Bros. & Co. v. Royal Ins. Co. [C. C.]* 192 Fed. 378).

1829-1831. (g) Effect of breach of condition

1829 (g). Whether the iron-safe clause be regarded as a promissory warranty or a condition subsequent, a breach thereof in a substantial particular will forfeit the policy.

Chamberlain v. Shawnee Fire Ins. Co., 177 Ala. 516, 58 South. 267; *Yates v. Thomason*, 83 Ark. 126, 102 S. W. 1112; *Continental Ins. Co. v. Rosenberg*, 7 Pennewill (Del.) 174, 74 Atl. 1073; *Hartford Fire Ins. Co. v. Hollis*, 50 South. 985, 58 Fla. 268; *Johnson v. Sun Fire Ins. Co.*, 60 S. E. 118, 3 Ga. App. 430; *Powell v. Commonwealth Ins. Co.*, 3 Ga. App. 436, 60 S. E. 120; *Buchman v. Insurance Co. of North America*, 134 Ga. 506, 68 S. E. 71; *Finleyson Bros. v. Liverpool & London & Globe Ins. Co.*, 16 Ga. App. 51, 84 S. E. 311; *Royal Exch. Assur. of London, England, v. Gilmore*, 89 S. E. 1047, 18 Ga. App. 515; *Farmers' Mut. Fire Ass'n v. Steed* (Ga. App.) 93 S. E. 75; *Crandon v. Home Ins. Co. of New York*, 99 Kan. 785, 163 Pac. 458; *Reynolds v. German American Ins. Co.*, 107 Md. 110, 68 Atl. 262, 15 L. R. A. (N. S.) 345; *Miller v. Home Ins. Co. of New York*, 96 Atl. 267, 127 Md. 140; *Johnson v. Mercantile Town Mut. Fire Ins. Co.*, 96 S. W. 697, 120 Mo. App. 80; *T. S. Hollenbeck & Co. v. Mercantile Town Mut. Fire Ins. Co.*, 113 S. W. 217, 133 Mo. App. 57; *Wolowitch v. National Surety Co. of New York*, 136 N. Y. Supp. 793, 152 App. Div. 14; *German American Ins. Co. v. Fuller*, 110 Pac. 763, 26 Okl. 722; *Shawnee Fire Ins. Co. v. Thompson & Rowell*, 30 Okl. 466, 119 Pac. 965; *Western Nat. Life Ins. Co. v. Williamson-Halsell-Frazier Co.*, 37 Okl. 213, 131 Pac. 691; *Scottish Union & National Ins. Co. v. Cornett Bros.*, 142 Pac. 315, 42 Okl. 645; *Fire Ass'n of Philadelphia v. Same*, 142 Pac. 317, 42 Okl. 703; *German Ins. Co. v. Bevill* (Tex. Civ. App.) 126 S. W. 31; *Orient Ins. Co. v. Dorroh-Kelly Mercantile Co.*, 59 Tex. Civ. App. 289, 126

S. W. 616, affirmed in 104 Tex. 199, 135 S. W. 1165; National Union Fire Ins. Co. v. Walker (Tex. Civ. App.) 156 S. W. 1095; Royal Ins. Co. v. Okasaki (Tex. Civ. App.) 177 S. W. 200; Commonwealth Ins. Co. of New York v. Finegold (Tex. Civ. App.) 183 S. W. 833; McPherson v. Camden Fire Ins. Co. (Tex. Civ. App.) 185 S. W. 1055; Westchester Fire Ins. Co. v. McMinn (Tex. Civ. App.) 188 S. W. 25; Prudential Fire Ins. Co. v. Alley, 51 S. E. 812, 104 Va. 856; Royal Ins. Co., Limited, of Liverpool, Eng., v. Kline Bros. & Co., 198 Fed. 468, 117 C. C. A. 228, reversing judgment (C. C.) Kline Bros. & Co. v. Royal Ins. Co., 192 Fed. 378.

A breach does not work a forfeiture unless the insurer so elects. Pace v. American Cent. Ins. Co., 158 S. W. 892, 173 Mo. App. 485.

The clause is regarded as material to the risk (Scottish Union & National Ins. Co. v. Weeks Drug Co., 55 Tex. Civ. App. 263, 118 S. W. 1086), and it is not essential that noncompliance therewith was with intent to defraud (Scottish Union & Nat. Ins. Co. v. Virginia Shirt Co., 113 Va. 353, 74 S. E. 228). It is not essential that the breach should have in any manner contributed to the loss.

Johnson v. Farmers' Ins. Co. of Cedar Rapids, 126 Iowa, 565, 102 N. W. 502; King v. Concordia Fire Ins. Co., 140 Mich. 258, 103 N. W. 616, 6 Ann. Cas. 87.

It was, however, held in Queen of Arkansas Ins. Co. v. Forlines, 94 Ark. 227, 126 S. W. 719, that a breach of the iron safe clause does not forfeit the policy ipso facto, but simply entitles the insurer to forfeit it at its option. And in Northern Assur. Co. of London v. Carpenter (Ind. App.) 92 N. E. 1042, it was said that insurer had no right to avoid the policy for failure of insured to make out an inventory, and hence was not required to elect to rescind the contract on failure of insured to make the inventory in order to insist on the defense in case of loss of failure so to do; it being insured who had the right of election to put the policy in force by making the inventory.

A condition, in a policy to protect against loss by burglary, that the insured shall keep books of account, is intended for the protection of the insurer against an excessive claim; and where the amount of loss sustained by a burglary is not in dispute the insurer is not relieved of liability by the fact that the books were destroyed by fire after the burglary was committed (Leiman v. Metropolitan Surety Co. [Sup.] 111 N. Y. Supp. 536).

That insured did not make inventory or keep books and preserve same in an iron safe must be specially pleaded. Ennis v. Retail Merchants' Ass'n Mut. Fire Ins. Co., 33 N. D. 20, 156 N. W. 234.

**20. VIOLATION OF CONDITION AS TO OTHER INSURANCE AS
GROUND OF FORFEITURE**

1831-1834. (a) Nature and construction of condition in general

1832 (a). The condition forbidding other insurance on the property without the consent of the insurer is reasonable and valid.

Ohio Farmers' Ins. Co. v. Williams (Ind. App.) 112 N. E. 556; Pettit v. St. Paul Fire & Marine Ins. Co., 100 Kan. 482, 164 Pac. 1096; Northwestern Nat. Ins. Co. v. Avant, 132 Ky. 106, 116 S. W. 274; Hurst Home Ins. Co. v. Deatley, 175 Ky. 728, 194 S. W. 910, L. R. A. 1917E, 750; Polk v. Western Assur. Co., 90 S. W. 397, 114 Mo. App. 514; Rogers v. Home Ins. Co., 155 Mo. App. 276, 136 S. W. 743; First Nat. Bank v. German American Ins. Co., 23 N. D. 139, 134 N. W. 873; Spann v. Phoenix Ins. Co., 83 S. C. 262, 65 S. E. 232; National Union Fire Ins. Co. v. Dorroh, 63 Tex. Civ. App. 620, 133 S. W. 475; Rice v. Hartford Ins. Co., 50 Wash. 346, 97 Pac. 238; Bakhaus v. Germania Fire Ins. Co., 176 Fed. 879, 100 C. C. A. 349.

The condition is valid, though it provides for forfeiture, whether the other insurance is "valid or invalid."

Northwestern Nat. Ins. Co. v. Avant, 132 Ky. 106, 116 S. W. 274; Spann v. Phoenix Ins. Co. of Hartford, Conn., 65 S. E. 232, 83 S. C. 262; National Union Fire Ins. Co. v. Dorroh, 63 Tex. Civ. App. 620, 133 S. W. 475.

It is immaterial that the insured did not know of the existence of the provision in the policy (Rice v. Hartford Ins. Co., 50 Wash. 346, 97 Pac. 238).

The condition is usually regarded as in the nature of a promissory warranty (Gross v. Colonial Assur. Co., 56 Tex. Civ. App. 627, 121 S. W. 517), and in so far as it is promissory in its nature relates only to subsequent insurance, and not to conditions existing at the time the policy was issued (Scottish Union & National Ins. Co. v. Wade, 59 Tex. Civ. App. 631, 127 S. W. 1186). So, too, the rights of the parties under the provision become fixed at the time of the loss, and anything done by the insured after that time in violation of that provision will not impair the liability of the company (Allemania Fire Ins. Co. v. Fordtran [Tex. Civ. App.] 128 S. W. 692). The term "other insurance" means, of course, insurance

in addition to that effected by the policy itself (*De Loach & Co. v. Ætna Ins. Co.*, 62 S. E. 473, 4 Ga. App. 746).

1834-1837. (b) Effect of breach of condition

1834 (b). If the policy does not stipulate against additional insurance, the making of subsequent insurance is without effect upon the validity of the contract (*Polk v. Western Assur. Co.*, 90 S. W. 397, 114 Mo. App. 514).

1835 (b). Where a policy contains a clause providing that the policy shall be void if insured has or shall procure any other insurance on the property, the procurement of additional insurance without the consent of the insurer avoids the policy.

Nabors v. Dixie Mut. Fire Ins. Co., 105 S. W. 92, 84 Ark. 184; *Johnson v. Sun Fire Ins. Co.*, 60 S. E. 118, 3 Ga. App. 430; *Wilson v. Anchor Fire Ins. Co.*, 143 Iowa, 458, 122 N. W. 157; *Carleton v. Patrons' Androscoggin Mut. Fire Ins. Co.*, 109 Me. 79, 82 Atl. 649, 39 L. R. A. (N. S.) 951; *Lake Superior Produce & Cold Storage Co. v. Concordia Fire Ins. Co.*, 95 Minn. 492, 104 N. W. 560; *Kring v. Globe Farmers' Town Mut. Fire, Tornado, Cyclone & Windstorm Ins. Co. of Rock Port*, 195 Mo. App. 133, 189 S. W. 628; *Tilton v. Farmers' Ins. Co. of Town of Palatine*, 143 N. Y. Supp. 107, 82 Misc. Rep. 79; *First Nat. Bank v. German American Ins. Co.*, 23 N. D. 139, 134 N. W. 873; *Weller v. Lancaster County Mut. Ins. Co.*, 50 Pa. Super. Ct. 249; *Camden Wholesale Grocery v. National Fire Ins. Co. of Hartford, Conn.*, 106 S. C. 467, 91 S. E. 732; *Wynn v. Caledonian Ins. Co.*, 100 S. C. 47, 84 S. E. 306; *Mechanics' & Traders' Ins. Co. v. Dalton* (Tex. Civ. App.) 189 S. W. 771; *Rice v. Hartford Ins. Co.*, 50 Wash. 346, 97 Pac. 238.

Where the purchaser of insured property, after assignment to him of an insurance policy, took out additional insurance in violation of the policy, he was not entitled, in view of Civ. Code 1910, § 2489, to recover on the policy. *Hughes v. Hartford Fire Ins. Co.*, 87 S. E. 1042, 144 Ga. 740.

But it has been held in *Southern Nat. Ins. Co. v. Barr* (Tex. Civ. App.) 148 S. W. 845, that the provision does not make it ipso facto void by the issuance of a second policy on the property by another company.

Under Pub. Acts Mich. 1911, No. 128, plaintiff held not to forfeit his fire insurance policy because he did not, as provided by insurer's by-laws, notify it and obtain consent to additional insurance. *Lagden v. Concordia Mut. Fire Ins. Co. of Bay, Saginaw, and Arenac Counties*, 188 Mich. 689, 154 N. W. 87.

1837 (b). That the insured procured other insurance in violation of the condition is a matter of defense, and to be available must be pleaded.

Western Assur. Co. v. Ferrell (Miss.) 40 South. 8; Glinners' Mut. Underwriters of San Angelo, Tex., v. Willey & House (Tex. Civ. App.) 147 S. W. 629.

An insurer, defending affirmatively on the ground of forfeiture by securing other insurance in violation of policy provisions, has the burden of proving the issuance and acceptance of the second policy, although the insured admits its existence and denies the acceptance (American Ins. Co. v. Crawford, 110 Miss. 493, 70 South. 579).

The sufficiency of the evidence to show a breach of the condition is considered in Allemania Fire Ins. Co. v. Fordtran (Tex. Civ. App.) 128 S. W. 692.

1837-1838. (e) Same—Knowledge and good faith of insured

1837 (c). A condition against other insurance is not violated by subsequent insurance procured without the insured's knowledge or consent.

Humble v. German Alliance Ins. Co., 85 Kan. 140, 116 Pac. 472, Ann. Cas. 1912D, 630; North British & Mercantile Ins. Co. v. Robertson, 134 Ky. 529, 121 S. W. 630.

Whether fire policies constituting additional insurance in violation of that clause were issued without the request of insured and by mistake, notwithstanding his acceptance thereof, and payment of premiums, is for the jury. North British & Mercantile Ins. Co. v. Robertson, 134 Ky. 529, 121 S. W. 630.

And where defense to action on fire policy was procuring of concurrent insurance the fact that plaintiff, in applying for renewal of insurance on other property, wrote in description of destroyed property and sent verified proof of loss before he discovered mistake did not estop him from showing real intention (Lovett v. National Fire Ins. Co. of Hartford, Conn., 99 Kan. 759, 162 Pac. 1162).

1838 (c). But the mere fact that the insured was ignorant of the existence of the condition in the policy does not excuse him (Rice v. Hartford Ins. Co., 50 Wash. 346, 97 Pac. 238). Nor is he excused because of the mistaken belief that other concurrent insurance permitted by the policy had expired (National Union Fire Ins. Co. v. Dorroh, 63 Tex. Civ. App. 620, 133 S. W. 475).

1839-1840. (e) Same—Termination of additional insurance

1839 (e). Where a nonresident insurance broker negotiated two policies, and upon receiving notice that one of them would be canceled negotiated another policy, which he expressly stated was to take the place of the canceled policy, the canceled policy became ineffective upon the negotiation of the second, and the second one was not invalid because it and the one canceled constituted more insurance than was represented to be upon the property (*Benedict v. Security Ins. Co.*, 133 N. Y. Supp. 165, 147 App. Div. 810).

1842-1843. (g) Sufficiency of consent to additional insurance

1842 (g). An indorsement on a policy permitting the insured "\$—— other insurance" is of no effect (*Fountain v. Standard Fire Ins. Co.*, 155 Iowa, 96, 134 N. W. 1090).

1843 (g). Where an insurance policy provided that, since a statute provided that no insurance company should take risk on any property for more than three-fourths its value, the total insurance on the described property should be limited to that, and in case of other insurance the company should be liable proportionately, that provision impliedly granted permission for additional insurance up to three-fourths of the value of the property, whether in that company or not, and hence nullified the effect of a provision that additional insurance, without the insurer's consent, shall avoid the policy (*Sheets v. Iowa State Ins. Co.*, 153 Mo. App. 620, 135 S. W. 80).

Whether the agent of insurer assented to additional insurance is for the jury (*Northwestern Nat. Ins. Co. v. Avant*, 132 Ky. 106, 116 S. W. 274).

1843-1845. (h) What constitutes other insurance in general

1844 (h). The provision of a policy that other insurance covering the property must be assented to in writing on the policy, though valid, is not violated, where the company to which application for additional insurance was made, as well as the owner, understood that no risk was assumed by such company (*National Mut. Fire Ins. Co. v. Duncan*, 44 Colo. 472, 98 Pac. 634, 20 L. R. A. [N. S.] 340). And policies issued without the request of the insured and by mistake, and which he did not seek to enforce, are, in effect, no insurance at all (*North British & Mercantile Ins. Co. v. Robertson*, 134 Ky. 529, 121 S. W. 630).

1845-1847 FORFEITURE OF CONTRACT—INSURANCE OF PROPERTY

1845-1847. (i) Identity of subject-matter

1845 (i). In *Norwich Union Fire Ins. Soc. v. Cheaney Bros.*, 61 Tex. Civ. App. 220, 128 S. W. 1163, it was held that, in order that other insurance shall constitute "additional insurance" within the meaning of a policy, the property covered by both policies must be the same, and the burden of proving these facts is on the insurance company. And in *Towle v. Dirigo Mut. Fire Ins. Co.*, 107 Me. 317, 78 Atl. 374, where the first policy covered a dwelling house and barn, it was held that the taking out of additional insurance on the dwelling forfeited the insurance as to that property. A provision prohibiting insured from taking out additional insurance in another company on property described, or its contents, prohibits additional insurance on property covered by policy, but is inapplicable where only a barn was covered by policy, and its contents were later insured in another company (*Hurst Home Ins. Co. v. Deatley*, 175 Ky. 728, 194 S. W. 910, L. R. A. 1917E, 750). On the other hand, in *Johnson v. Farmers' Ins. Co.*, 126 Iowa, 565, 102 N. W. 502, it was held that the provision of an insurance policy covering "farm implements," prohibiting additional insurance, was violated by the taking out of a policy covering "mowing machines and binders," although the latter implements were purchased after the first policy was taken out, as they were within the provisions of the first policy, and protected by it.

Where the defense to action on a fire policy was procuring of other insurance, as plaintiff did not intend to procure other insurance upon destroyed property, making of proof under second policy which was intended as renewal of policy on other property, did not as matter of law, operate as an election to treat it as valid barring recovery. *Lovett v. National Fire Ins. Co. of Hartford, Conn.*, 99 Kan. 759, 162 Pac. 1162.

1847. (j) Same—Commingleing insured goods with goods otherwise insured

1847 (j). In *Norwich Union Fire Ins. Soc. v. Cheaney Bros.*, 61 Tex. Civ. App. 220, 128 S. W. 1163, the rule was recognized that, if goods from one building were so intermingled with insured goods in another building as to become one entire stock and lose their identity there would be a violation of the condition against other insurance. But it was held that the evidence was insufficient to show such intermingling of goods.

1848-1849. (k) Insurance of separate interests

1848 (k). A transfer of property will not carry with it, in the absence of an assignment, a policy of fire insurance, so as to avoid a later policy providing against having or procuring other insurance (*German Fire Ins. Co. of Indiana v. Greenwald*, 51 Ind. App. 469, 99 N. E. 1011). So, too, where a lienholder procured additional insurance without authority of the owner, who had procured a policy stipulating that it should be void if insured procured other insurance, the owner's policy was not void (*Ginners' Mut. Underwriters v. Wiley & House* [Tex. Civ. App.] 147 S. W. 629). Where the owner of a dwelling house covered by a policy of insurance retained such policy under an agreement between himself and a purchaser, his rights thereunder could not be changed to his harm by the purchaser's attempt to get insurance upon his interest without the owner's knowledge (*Smith v. American Ins. Co.*, 177 Mich. 123, 143 N. W. 54). The act of the husband of the purchaser from insured in obtaining other insurance on the property did not forfeit the first insured's rights in the policy (*Dumphy v. Commercial Union Assur. Co., Limited*, of London, 107 Tex. 107, 174 S. W. 814).

1849-1851. (l) Same—Interests of mortgagor and mortgagee

1849 (l). If both mortgagor and mortgagee of real estate have separate insurance upon their respective interests, then neither policy can be said to be "additional insurance" with respect to other policy, since the terms "additional insurance" and "other insurance," as used in policies providing a forfeiture, means the same insurable interest in the property (*Hackett v. Cash*, 196 Ala. 403, 72 South. 52). So the procurement of a policy by a mortgagee does not avoid a policy procured by the mortgagor (*Kelley v. People's Nat. Fire Ins. Co.*, 104 N. E. 188, 262 Ill. 158, 50 L. R. A. [N. S.] 1164, affirming judgment 181 Ill. App. 142). A policy of insurance payable to mortgagee as interest may appear is vitiated by other insurance by the mortgagor, but is not vitiated by other insurance by the mortgagee upon the mortgagor's interest, without the mortgagor's knowledge or consent (*Gould v. Maine Farmers' Mut. Fire Ins. Co.*, 114 Me. 416, 96 Atl. 732, L. R. A. 1917A, 604).

1852-1854 FORFEITURE OF CONTRACT—INSURANCE OF PROPERTY

1852-1854. (o) Void or inoperative policies

1853 (o). In *Wilson v. Anchor Fire Ins. Co.*, 143 Iowa, 458, 122 N. W. 157, the policy stipulated that it should be void on insured procuring additional insurance without insurer's consent. Insured procured an additional policy, stipulating that it should be void if other insurance existed. The first insurer did not consent to the additional insurance, but was merely informed that an application for additional insurance had been made in the belief that the first policy had expired, and that insured had thereafter notified the agent of the second insurer of the mistake. It was held that the additional insurance was obtained without the consent of the first insurer, rendering the first policy void, and authorizing full recovery on the second.

1854 (o). A provision that the policy shall be void if insured, without notice to and consent of the insurer, procures additional insurance, whether valid or not, is violated by the procuring of an invalid additional policy (*National Union Fire Ins. Co. v. Dorroh*, 63 Tex. Civ. App. 620, 133 S. W. 475). But policies issued without the request of insured and by mistake and which he did not seek to enforce are in effect no insurance at all, and their mere formal existence does not render void another policy under a clause providing that it should be void if insured then had or should thereafter procure any additional insurance, whether valid or not (*North British & Mercantile Ins. Co. v. Robertson*, 134 Ky. 529, 121 S. W. 630). In *Moore v. Farmers' Mut. Fire Ins. Co.*, 45 Pa. Super. Ct. 541, the insured took out a policy of fire insurance which provided that "all policies in this company shall be null and void whenever buildings or their contents are insured in other companies." He thereafter took from a second company a policy which provided that "the entire policy, unless otherwise provided by agreement indorsed hereon or added thereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance whether valid or not, on property covered in whole or in part by this policy." No reference was made in the second policy to the prior insurance. After the property insured was destroyed by fire, the insured compromised and settled with the second company, and received a payment from it on account of his loss. It was held that the first policy was not rendered void by the taking out of the second pol-

icy; and that the settlement with the second company did not render the first policy void.

It is a question for the jury whether a particular policy became a binding contract. *Greenough v. Phoenix Ins. Co.*, 206 Mass. 247, 92 N. E. 447.

1855-1857. (q) Insurance in excess of stipulated amount

1855 (q). The breach of a condition in a fire policy limiting the amount of concurrent insurance will avoid the policy (*Harwood v. National Union Fire Ins. Co.*, 156 S. W. 475, 170 Mo. App. 298). But a slight excess of additional insurance under a permit to take out such an insurance, without proof of fraudulent intent, does not invalidate the policy (*Teter v. Norfolk Fire Ins. Corporation*, 74 W. Va. 461, 82 S. E. 201).

A provision that a policy should be void, in the absence of agreement, if insured procured other insurance, was not nullified by a concurrent insurance clause which did not provide for forfeiture for its violation. *Aetna Ins. Co. v. Waco Co.* (Tex. Civ. App.) 189 S. W. 315.

1856 (q). Where one of the several agents through which property was insured wrote two policies of \$3,000 each, and one of \$2,000, and, when they expired, wrote renewals thereof, and advised his companies of the fact, but, when he came to deliver the policies and collect the premiums, he was told by insured to reduce the amount written by him to \$6,000, whereupon he took back and destroyed the \$2,000 policy, there was no overinsurance by the writing of the latter policy, in violation of the provisions of other policies authorizing concurrent insurance to a certain amount only (*Dalton v. Germania Fire Ins. Co.* [Iowa] 102 N. W. 127). So, where a policy contained a clause requiring plaintiff to maintain 80 per cent. insurance, and also provided that the policy should be void in case of additional insurance without the consent of the insurer, the placing of additional insurance on the property without the insurer's consent, to an amount exceeding the entire value of the property, invalidated the policy (*Woolford v. Phoenix Ins. Co.*, 76 N. E. 722, 190 Mass. 233).

In *National Union Fire Ins. Co. v. Dorroh*, 63 Tex. Civ. App. 620, 133 S. W. 475, the original policy stipulated that it should be void on insured procuring additional insurance, valid or invalid, in excess of concurrent insurance allowed. Insured, under the mis-

taken belief that other insurance, within the amount of the concurrent insurance allowed, had expired procured a new policy, but because the other insurance was in force, the new policy exceeded the amount of concurrent insurance allowed. It was held that the original policy was invalidated by the procurement of the new policy, and that the cancellation of the new policy after a fire did not prevent a forfeiture of the original policy. And in *Hartford Fire Ins. Co. v. Dorroh* (Tex. Civ. App.) 133 S. W. 465, it was held that, where insurer claimed that, after insured acquired information that an arson was about to be committed on adjoining property, he took out another policy covering the property destroyed, such fact, if true, did not constitute such fraud as would be a defense to the policy sued on, unless in procuring such additional insurance defendant exceeded the amount of current insurance permitted by the policy in suit.

In *Pennsylvania Fire Ins. Co. v. Waggener*, 44 Tex. Civ. App. 144, 97 S. W. 541, the policy provided that, "in the event of loss by fire on the property covered under this policy, this company shall not be liable for an amount greater than three-fourths of the actual loss on each item of property covered, * * * and, in the event of additional insurance hereon, this company shall be liable for its proportion only of three-fourths of such loss on each item, not exceeding the amount insured on each such item. Other concurrent insurance permitted, but total insurance shall at no time exceed three-fourths of the actual cash value of each item of the property hereby covered." It was held that concurrent insurance and overvaluation did not avoid the policy, in the absence of an intention to defraud.

The Texas statute (Rev. St. 1895, art. 3096aa, added by Acts 28th Leg. 1903, p. 94, c. 69, § 1) provides that any provision of an insurance contract, which provides that any answers or statements made therein or in the application, if untrue or false, shall render the policy void, shall be of no effect unless the matter misrepresented is material to the risk. A fire insurance policy provided that it should be void if assured then had, or thereafter procured other insurance. It was held in *Gross v. Colonial Assur. Co.*, 56 Tex. Civ. App. 627, 121 S. W. 517, construing the statute under the assumption that it was enacted with knowledge of the judicial doctrine of promissory warranties and representations, and requiring strict compliance with the former, that it did not abolish such doctrine, and the policy was avoided by carrying policies in other companies,

\$750 in excess of the \$37,000 concurrent insurance permitted, and the small amount of the excess, compared with the total insurance permitted, did not excuse the violation of the provision.

1857 (q). Where an insurance company issues a policy, and by indorsement thereon permits other insurance in a specified sum, and afterwards itself issues another policy in favor of the same person on the same risk, and grants permission for a different amount of additional concurrent insurance, and each policy provides against additional insurance unless specially permitted, the insured cannot, without avoiding the policies, procure a total insurance in excess of the largest amount permitted under either of them (*De Loach & Co. v. Aetna Ins. Co.*, 62 S. E. 473, 4 Ga. App. 746).

Under Act Tex. Sept. 6, 1910 (Acts 31st Leg., 4th Called Sess. c. 8), § 18, concurrent policy of fire insurance with a stipulation prohibiting an insurance in excess of \$15,000, which was the policy contracted for, could not support assured's recovery, though they had carried excess insurance, on the theory that it was a coinsurance policy, in view of the classification of the property by the state insurance board. *Reliance Ins. Co. of Philadelphia v. Dalton* (Tex. Civ. App.) 180 S. W. 668, denying rehearing (Tex. Civ. App.) 178 S. W. 966.

1857-1858. (r) Concurrent insurance

1858 (r). The phrase, "\$1,500 total concurrent insurance permitted, including this policy," indorsed on a fire policy, limits the total amount of insurance to \$1,500, and does not allow \$1,500 additional insurance (*Home Ins. Co. of New York v. Morrow*, 39 South. 587, 145 Ala. 284). So, too, a policy insuring a building for \$800, which stipulates, "\$800 total concurrent insurance permitted, including this policy," permits other concurrent insurance, not exceeding \$800 (*Western Assur. Co. v. Ferrell* [Miss.] 40 South. 8). Similarly a provision in a policy, "\$150,000 total concurrent insurance permitted," is susceptible of more than one construction, and it must be construed to permit other insurance to the amount of \$150,000; the word "concurrent" meaning "running with" (*Parkhurst-Davis Mercantile Co. v. Merchant Underwriters at the Indemnity Exch.*, 86 N. E. 1062, 237 Ill. 492, affirming 140 Ill. App. 504). The addition to a fire policy of a rider authorizing concurrent insurance does not invalidate a provision that, unless allowed, additional insurance would avoid the policy. Hence, where a rider authorized concurrent insurance to the amount of \$8,500, the procuring of insurance beyond that amount would invalidate the pol-

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icy, under the provision declaring that additional insurance would avoid it (*Home Ins. Co. v. Williams*, 237 Fed. 171, 150 C. C. A. 317).

A two-story sample room, connected with a hotel and used by guests of the hotel to display their wares, is within a fire policy covering the hotel and additions thereto attached, and subsequent insurance on the sample room alone is within the policy permitting concurrent insurance.

Interstate Fire Ins. Co. v. Nelson, 105 Miss. 437, 62 South. 425; *Southern States Fire & Casualty Ins. Co. v. Same* (Miss.) 62 South. 426.

Where defendant's policy permitted other concurrent insurance without limitation, it was not avoided by reason of the fact that plaintiff secured Lloyd's insurance and a marine policy covering the same property, insuring against the same casualty and during the same period, but not subject to the identical liability (*Globe & Rutgers Fire Ins. Co. v. Alaska-Portland Packers' Ass'n*, 205 Fed. 32, 123 C. C. A. 340, 49 L. R. A. [N. S.] 374). Where a policy insuring property to the extent of three-fourths of the value thereof permitted other concurrent insurance, a subsequent policy on the same property to the full value thereof was concurrent insurance (*Connecticut Fire Ins. Co. v. Union Mercantile Co.*, 161 Ky. 718, 171 S. W. 407).

The receipt of a note and worthless deed by plaintiff from its cashier to evidence an embezzlement prior to the execution of defendant's fidelity bond is not a taking of concurrent security under a coinsurance clause. *Prosser Power Co. v. United States Fidelity & Guaranty Co.*, 73 Wash. 304, 132 Pac. 48.

1858-1859. (s) Necessity of maintaining other insurance to amount stipulated

1858 (s). A stipulation in a policy requiring the insured to take out other concurrent insurance on the same property was fulfilled where the property covered by both policies, though described differently, was the same, so that there could be an apportionment of the damages between the two companies in case of loss (*Standard Leather Co. v. Mercantile Town Mut. Ins. Co.*, 111 S. W. 631, 131 Mo. App. 701). A provision of a Wisconsin policy requiring coinsurance is satisfied, though the coinsurance did not cover all the property insured by defendants, where it was sufficient in amount, and there was no provision that it should be concurrent

and cover the whole property (*Northwestern Fuel Co. v. Boston Ins. Co.*, 154 N. W. 515, 131 Minn. 19).

21. UNAUTHORIZED ASSIGNMENT OF POLICY AS GROUND OF FORFEITURE

1859-1860. (a) Restrictions on assignment in general

1859 (a). The provision in a fire insurance policy that, unless otherwise provided by agreement indorsed thereon, the entire policy should be void if assigned before a loss, is reasonable and binding on insured (*Morgan v. American Cent. Ins. Co.* [W. Va.] 92 S. E. 84, L. R. A. 1917D, 1049).

1860 (a). While stipulations in fire policies requiring written consent of the insurer to a transfer and providing forfeiture for failure to comply therewith should be strictly construed as against a forfeiture, yet they will be upheld by the court where they clearly and plainly exist (*Bozeman v. Sun Ins. Co.*, 170 Ala. 373, 54 South. 178).

The rule that a temporary alienation of insured property will not avoid the policy, if the property is reconveyed to the proper person before the loss, under a provision prohibiting change of ownership without consent of the insurer, does not apply to transfers of the policy (*Bozeman v. Sun Ins. Co.*, 170 Ala. 373, 54 South. 178).

1860-1862. (b) Consent to assignment

1862 (b). Where the agent of the insurer consented to the assignment, and it was contended that the agency had been revoked prior thereto, whether insured had such information as would put him on notice of the revocation is a question for the jury (*Gragg v. Home Ins. Co.* [Ky.] 107 S. W. 321).

Sufficiency of evidence to show assent of the insurer to assignment of a fire policy. *Continental Ins. Co. v. Bradley*, 189 S. W. 706, 172 Ky. 549.

1862-1865. (c) What is a breach of condition

1863 (c). A fire policy invalidated by an assignment before loss is not so invalidated unless there is an actual transfer, either by actual delivery or in writing, and a mere promise by insured to assign, and a subsequent statement by him that the policy has been assigned, will not void the policy, where in fact there has been no legal assignment (*Manufacturers' Mut. Fire Ins. Co. v. Swaney*, 53 Ind. App. 429, 101 N. E. 843). An assignment of the policy aft-

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er the fire, though dated before the fire, did not defeat the policy (Moore v. St. Paul Fire & Marine Ins. Co., 176 Iowa, 549, 156 N. W. 676).

1864 (c). Where an insurance policy has been assigned by mistake, and there has been no delivery, and no consideration for the assignment, and it was made subject to the consent of the insurer, and therefore ineffective until the consent was given, the policy is not forfeited, under a clause providing that it should be void if an assignment was made (Pennsylvania Fire Ins. Co. v. Waggener, 44 Tex. Civ. App. 144, 97 S. W. 541).

In *Cremo Light Co. v. Parker*, 118 App. Div. 845, 103 N. Y. Supp. 710, it appeared that a Lloyds policy insured the C. Incandescent Light Company as it might subsequently be constituted, and provided that the policy should be void in case of an assignment thereof, or in case of change in the title or possession of the property. Thereafter the C. Lighting Company was organized for the purpose, among others, of purchasing the business properties, etc., of the C. Incandescent Light Company, which was then in existence and engaged in business, and after the purchase those who had managed the selling corporation managed the business of the purchasing corporation. Such persons had owned the entire stock of the Incandescent Company, and owned nearly all the stock of the C. Lighting Company. It was held that the policy was forfeited.

1865 (c). A provision in a mortgage given by a corporation to secure bonds requiring the mortgagor to keep the property insured for the benefit of the mortgagee, and that "this section shall be construed and taken to be an assignment of the said first party's interest in and to any and all insurance policies thereon for the use and benefit of the holders of said bonds in case of loss," is not an assignment of a policy of insurance on the property, in contravention of a provision therein that any assignment thereof before a loss shall work a forfeiture (*Humboldt Fire Ins. Co. v. W. H. Ashley Silk Co.*, 185 Fed. 54, 107 C. C. A. 274).

1865-1866. (d) Same—Assignment or pledge as collateral security

1865 (d). A clause in a policy of insurance prohibiting its assignment before loss does not prohibit a mere conditional transfer to a creditor, which in effect would only give the creditor a lien on the proceeds of the policy, in the event of loss, to secure his indebtedness (*Scottish-Union & National Ins. Co. v. Andrews &*

Matthews, 89 S. W. 419, 40 Tex. Civ. App. 184). So the assignment of a policy with a face value of \$2,000, to a creditor as security on a debt of \$300, does not constitute an assignment of the policy in violation of a stipulation that it shall be void if assigned before loss (*Allen v. Phoenix Assur. Co.*, 12 Idaho, 653, 88 Pac. 245, 8 L. R. A. [N. S.] 903, 10 Ann. Cas. 328).

A provision of a fire policy that "if this policy be assigned, without the consent of the association indorsed hereon," it shall be void, was not clearly violated by insured's writing thereon when he mortgaged the house "in case of loss of fire proceeds of policy to be paid to" mortgagee "as his interest may appear," so as to avoid the policy after payment of premiums (*Henderson v. Abbeville Greenwood Mut. Ins. Ass'n*, 81 S. E. 171, 96 S. C. 430).

1866-1867. (e) Effect of breach of condition

1866 (e). A fire insurance policy providing that it should be void if assigned before a loss, unless by consent indorsed thereon, was avoided by a transfer before loss without such written consent, even though under oral direction of agent (*Morgan v. American Cent. Ins. Co.* [W. Va.] 92 S. E. 84, L. R. A. 1917D, 1049).

22. NONPAYMENT OF PREMIUMS OR ASSESSMENTS AS GROUND OF FORFEITURE

1867-1870. (a) Default as ground of forfeiture in general

1868 (a). A condition in a policy providing for the suspension or forfeiture of the policy on non-payment of the premium is reasonable and valid (*McCullough v. Home Ins. Co.*, 118 Tenn. 263, 100 S. W. 104, 12 Ann. Cas. 626). Where such a condition exists a default within the terms thereof is ground of forfeiture of the policy.

Coll v. Continental Ins. Co., 155 S. W. 872, 169 Mo. App. 634; *McCullough v. Home Ins. Co.*, 118 Tenn. 263, 100 S. W. 104, 12 Ann. Cas. 626; *Johnson v. Continental Ins. Co.*, of New York, 119 Tenn. 598, 107 S. W. 688; *Davis v. Home Ins. Co.*, 127 Tenn. 330, 155 S. W. 131, 44 L. R. A. (N. S.) 626; *Becker v. Exchange Mut. Fire Ins. Co. of Pennsylvania*, 177 Fed. 918, 101 C. C. A. 198, affirming judgment (C. C.) 165 Fed. 816.

A provision in notes given for premium that if they were not paid at maturity the policy should be void, is valid, but a further provision that, if not so paid, the whole amount of the premium should be considered earned, is a penalty which cannot be enforced (*Shaw-*

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nee Mut. Fire Ins. Co. v. Cannedy, 36 Okl. 733, 129 Pac. 865, 44 L. R. A. [N. S.] 376).

Where there has been a default in payment and after the loss insured paid the premium to an agent who had no knowledge of the loss, such payment did not revive the policy (Johnson v. Continental Ins. Co., 119 Tenn. 598, 107 S. W. 688).

In McCullough v. Home Ins. Co., 118 Tenn. 263, 100 S. W. 104, 12 Ann. Cas. 626, the defendant company insured complainant's property for a period of five years, one-fifth of the premium to be paid in cash, and the remainder in four annual installments, payable on January 1st of each succeeding year. The policy was issued as of March 19, 1902, and the cash payment made. The property was damaged by fire January 24, 1905, at which time the premium installment due January 1, 1905, was unpaid. The application provided that, if any single payment on any note given for any portion of the premium should be unpaid when due, the policy should be inoperative until such installment should be paid, and the note and policy contained a similar provision, and the note contained a provision that in the event of nonpayment of any installment the entire amount of the premium might be declared due. It was held that the contract was for insurance for five years, and not for five consecutive terms of one year each, payment for each of which years could be made any time before the beginning of that year, and that the default in the payment of the installment due caused the policy to be void so far as any loss occurring during such default.

1869 (a). Where the insurer agreed to look solely to the broker procuring the insurance for the premiums, the nonpayment of a premium did not affect the right of the insured to recover on a fire policy; the insurer's remedy being an action against the broker (Hanover Fire Ins. Co. v. Turner [Tex. Civ. App.] 147 S. W. 625). But, of course, if a broker is wholly the agent of the insured, he is answerable for the failure of the broker to pay over the premium and the policy will be forfeited (Becker v. Exchange Mut. Fire Ins. Co. [C. C.] 165 Fed. 816, affirmed in 177 Fed. 918, 101 C. C. A. 198).

Where the policy did not contain a provision that nonpayment of the premium should work a forfeiture, the failure of the insured to assign a claim which the insurer was to receive in part payment of the premium did not avoid the policy (Miller v. Assured's Nat. Mut. Fire Ins. Co., 106 N. E. 203, 264 Ill. 380, affirming judgment 184 Ill. App. 271). A fire policy is not invalidated by nonpayment of notes

given for the premium, where no reference is made to them in the policy, and its validity is not in any way made contingent upon payment thereof (*Arkansas Ins. Co. v. Cox*, 21 Okl. 873, 98 Pac. 552, 20 L. R. A. [N. S.] 775, 129 Am. St. Rep. 808). And to the same effect is *Goddard v. Northwestern Mut. Fire Ass'n*, 85 Wash. 585, 148 Pac. 893. So, where the policy which was the only contract for insurance which insured entered into contained no provision avoiding it for nonpayment of premium notes, a stipulation in such notes executed by a third person that "my insurance" should be void as long as the notes remain past due and unpaid would not invalidate the policy upon nonpayment of the notes (*Home Fire Ins. Co. v. Stancell*, 94 Ark. 578, 127 S. W. 966).

On the other hand, a provision in a policy that, if the note given for the premium is not paid when due, it shall forfeit the contract, is valid (*Travelers' Fire Ins. Co. of Pine Bluff, Ark., v. Mercer*, 32 Okl. 503, 122 Pac. 134). And if such condition exists a failure to pay the premium note according to its terms forfeits the policy.

Schmedding v. Northern Assur. Co., 170 Mich. 528, 136 N. W. 361;
Gleason v. Prudential Fire Ins. Co., 127 Tenn. 8, 151 S. W. 1030.

The mere fact that payment of the premium is expressly provided as the consideration for the policy does not make payment a condition precedent to the operation of the policy and to any recovery on it (*Raulet v. Northwestern Nat. Ins. Co. of Milwaukee*, 157 Cal. 213, 107 Pac. 292).

Where an owner of three farms has three separate policies of mutual fire insurance on the buildings on each of the farms, and has ignorantly paid assessments improperly levied by the company upon two of the policies after the property covered by the policies had been sold, and the company has then in its hands sufficient funds of the insured to cover a later assessment on the third policy, such funds are applicable to the payment of such assessment, and the company cannot claim, after the property covered by the third policy had been destroyed, that such policy had been forfeited for nonpayment of the assessment (*Bannister v. Spring Garden Mut. Fire Ins. Co.*, 50 Pa. Super. Ct. 45).

The sufficiency of the evidence to show default is considered in *Home Ins. Co. of New York v. Clements*, 90 S. W. 973, 28 Ky. Law Rep. 953; *Continental Ins. Co. of New York v. Hargrove*, 131 Ky. 837, 116 S. W. 256.

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1870-1873. (b) Same—Mutual companies

1870 (b). A condition in the policy or by-laws of a mutual company providing for forfeiture on default in the payment of assessments or premium notes is valid (*Nimic v. Security Mut. Hail Ins. Co.*, 84 Neb. 403, 121 N. W. 434). And where such provision exists, either in the policy or the by-laws, a default in payment forfeits the policy.

Hale v. Michigan Farmers' Mut. Fire Ins. Co., 111 N. W. 1068, 148 Mich. 453; *Nimic v. Security Mut. Hail Ins. Co.*, 84 Neb. 403, 121 N. W. 434.

Where a by-law of a mutual insurance company provides that, if the insured neglects or refuses to pay his loss dues within the time specified in his notice, his policy shall become null and void, a failure to pay does not ipso facto render the policy void. The provision is for the protection of the company, and, if the company does not choose to enforce the forfeiture, the policy continues in force against the member (*International Savings & Trust Co. v. Tillotson*, 34 Pa. Super. Ct. 521).

Under Insurance Law N. Y. §§ 261, 266-270, the statutory remedies against member of county co-operative insurance corporation were exclusive, and a by-law availing his policy after 30 days' failure to pay assessments is invalid. *Seely v. Tloga County Patrons' Fire Relief Ass'n*, 165 App. Div. 685, 151 N. Y. Supp. 126.

1871 (b). A tender of payment after the loss will not relieve the default, so as to prevent a forfeiture.

Driver v. Planters' Mut. Ins. Ass'n, 78 Ark. 127, 93 S. W. 752; *Johnson v. Continental Ins. Co. of New York*, 119 Tenn. 598, 107 S. W. 688; *Stutzman v. Cicero Mut. Fire Ins. Co.*, 150 Wis. 254, 136 N. W. 604.

So, where plaintiff insured in mutual fire insurance company was in default when fire occurred, subsequent payment of dues to bank, having no knowledge of loss, which payment was not accepted by the company, did not render it liable (*Wolff v. German-American Farmers' Mut. Ins. Co.* [Okl.] 159 Pac. 480).

However, a mutual insurance company cannot suspend a member for failure to pay an assessment, where, at the time of such failure, the company is indebted to him, on a loss under the policy, in a sum in excess of the assessment (*Freeman v. Farmers' Mut. Fire & Lightning Ins. Co.*, 97 S. W. 225, 121 Mo. App. 532). But a member of an insolvent mutual assessment insurance company cannot set off a debt due him for loss under a policy against assessments

due from him to the company to pay losses, even though the company is a foreign corporation and the suit to recover the assessment is brought by a foreign receiver (*Stone v. New Jersey & H. R. Ry. & Ferry Co.*, 75 N. J. Law, 172, 66 Atl. 1072).

Default in payment of assessment on the second of three successive fire policies in a mutual company, each providing that default in seasonable payment of an assessment shall render the policy void, does not render the third policy void, though the assessment was payable during its term (*Sturm v. Green Bay & De Pere Mut. Fire Ins. Co.*, 143 N. W. 151, 154 Wis. 420).

In *Younghoe v. Grain Shippers' Mut. Fire Ins. Ass'n*, 126 Iowa, 374, 102 N. W. 137, the facts were these: An agent for a mutual fire association, who had authority to take applications, deliver policies, and collect contingent fees, collected from an applicant a fee in excess of the legal contingent fee, on an understanding with insured that he should not be liable for any further payment during the first year of the policy. The amount turned over to the association by the agent, after deducting his percentage, exceeded the amount which it would have received if the legal contingent fee had been charged, and the association issued a policy, and thereafter an assessment was made against insured, which was not greater than the excess over the legal contingent fee. It was held that the association could not defend on the ground of nonpayment of the assessment, since it could not deny the agent's authority in collecting the excessive contingent fee, and it had sufficient funds of insured to satisfy the assessment.

The fact that a mutual company had a right of action against insured for an assessment would not relieve him of the necessity of performance of his part of the contract before he could sue thereon, as a right of action to enforce performance is not an equivalent of performance (*Russell v. Oxford County Patrons of Husbandry Mut. Fire Ins. Co.*, 107 Me. 362, 78 Atl. 459).

A forfeiture cannot be declared for nonpayment of an illegal assessment by a mutual fire insurance company, or one not made according to its charter provision (*Settle v. Farmers' & Laborers' Co-operative Ins. Ass'n of Monroe County*, 150 Mo. App. 520, 131 S. W. 136).

1873 (b). In an action on a policy, a plea which undertakes to set up that the policy has lapsed because of default in the payment of premium notes is bad, where it avers that payment of such notes was to be made "at such time and in such sums as the board of di-

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rectors may require," and does not aver that the board of directors, as such, have ever made requisition on the plaintiff for the payment of the whole or any part thereof (*Farmers' & Threshers' Mut. Ins. Co. v. Koons*, 120 Ill. App. 303).

The burden is on a mutual fire insurance company to prove that a legal assessment was made where it claims a forfeiture for non-payment of an assessment (*Settle v. Farmers' & Laborers' Co-operative Ins. Ass'n of Monroe County*, 150 Mo. App. 520, 131 S. W. 136), and also to show that the premium was unpaid, and that it was past due (*Olympia Brewing Co. v. Pioneer Mut. Ins. Ass'n*, 53 Wash. 16, 101 Pac. 371).

The admissibility of evidence to show payment of interest on a premium note when the contract provided for forfeiture on default in the payment of interest is considered in *Mutual Fire Ins. Co. of Montgomery County v. Ritter*, 113 Md. 163, 77 Atl. 388.

The sufficiency of the evidence to show whether there had been a default in the payment of assessments is considered in *Keating v. Patrons' Mut. Fire Ins. Co. of Michigan*, 125 N. W. 713, 160 Mich. 648.

1873-1874. (c) Absolute forfeiture or suspension of risk

1873 (c). Where the policy and premium note provide that the policy shall be void as long as the note on any part thereof remains unpaid default in payment suspends the policy, and there can be no recovery for a loss occurring during the continuance of the default.

Jefferson Mut. Ins. Co. v. Murry, 74 Ark. 507, 86 S. W. 813; *American Ins. Co. v. Hornbarger & Harris*, 85 Ark. 337, 108 S. W. 213; *McCullough v. Home Ins. Co.*, 118 Tenn. 263, 100 S. W. 104, 12 Ann. Cas. 626.

A provision of a fire policy that, if the premiums were not paid within 60 days from the attachment of the risk, the policy should be void while the premium remained unpaid should be construed to mean voidable at the election of the insurer. *Robinson v. Western Assur. Co.* (D. C.) 211 Fed. 747.

1874 (c). Under a by-law of a mutual fire insurance company that, if the premium should remain unpaid for 30 days after the taking effect of the policy, such policy should be and remain suspended until payment, and that during such period the policy should be unenforceable, and that, if it remained suspended for 60 days, it should be canceled without notice, the holder cannot recover.

er for loss occurring after the expiration of such period and the cancellation of the policy (*J. P. Lamb & Co. v. Merchants' Nat. Mut. Fire Ins. Co.*, 18 N. D. 253, 119 N. W. 1048).

1874-1877. (d) Proceedings to effect forfeiture—Notice

1874 (d). A provision in a policy of insurance that if the premium is not paid in cash, the policy may be terminated on notice to the insured modifies the forfeiture clause in the application, so that notice to insured is necessary before forfeiture for default in premium note can be declared (*Travelers' Fire Ins. Co. of Pine Bluff, Ark., v. Mercer*, 32 Okl. 503, 122 Pac. 134). And if the agent, in inducing insured to accept a fire policy, agreed to give him seasonable notice of the maturity of a premium note, that agreement will prevent the insurer from declaring forfeiture for nonpayment of the note, when no notice was given (*Gleason v. Prudential Fire Ins. Co.*, 127 Tenn. 8, 151 S. W. 1030). And where insured, before maturity of an installment of premium, received notice that on failure to pay at maturity the policy would be suspended, and after maturity a notice that because of nonpayment the policy had been suspended and would remain so while the premium remained unpaid, he could not have been misled into believing that the policy was yet in force because of a previous indulgence in being allowed to pay the premium after maturity (*Johnson v. Continental Ins. Co.*, 119 Tenn. 598, 107 S. W. 688).

The Iowa statute (Code, § 1727) provides that no insurance policy shall be forfeited for nonpayment of any premium note, unless within 30 days prior to or after maturity thereof the company shall serve notice in writing upon the insured that such premium is due, or to become due, stating the amount, and that no policy shall be forfeited except in accordance with the provisions of such section. Section 1741 provides that every insurance company shall attach to its policy, or indorse thereon, a copy of any application or representation of the insured which, by the terms of the policy, is made a part thereof, or which may in any manner affect the validity of such policy, and if the company neglects to comply with such requirements, it shall be precluded from pleading, alleging, or proving any such application or representation or falsity thereof in any action on such policy. It was held in *Robey v. State Ins. Co.*, 146 Iowa, 170, 124 N. W. 775, that an insurance company, in an action for loss, cannot set up a forfeiture for nonpayment of premium, where no copies of the unpaid premium notes are attached to the

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policy, and the giving of the notice required by section 1727 will not discharge its liability.

1877-1879. (e) Same—Mutual companies

1877 (e). Where an insurance company determines to cancel a risk for nonpayment of an assessment, the insured is entitled to reasonable notice (*Sherrod v. Farmers' Mut. Fire Ins. Ass'n*, 51 S. E. 910, 139 N. C. 167). But where the policy expressly provides for notice there can be no forfeiture if the notice was not received by insured though it was mailed (*Puryear v. Farmers' Mut. Ins. Ass'n*, 137 Ga. 579, 73 S. E. 851). Prejudice to the insured through failure to comply with statutory provisions as to notice is not essential (*Breakstone v. Appleton Mut. Fire Ins. Co.*, 149 Wis. 303, 135 N. W. 853).

That notice is necessary to forfeit the policy, see, also, *Salmon v. Farm Property Mut. Ins. Ass'n of Iowa*, 168 Iowa, 521, 150 N. W. 680; *Frakes v. Mutual Fire Co. of Portland*, 69 Or. 217, 138 Pac. 224.

A provision that the policy shall become void on neglect to pay the assessment after notice is self-executing.

Russell v. Oxford County Patrons of Husbandry Mut. Fire Ins. Co., 107 Me. 362, 78 Atl. 459; *Mutual Fire Ins. Co. of Portland v. Maple*, 60 Or. 359, 119 Pac. 484, 38 L. R. A. (N. S.) 726; *Stutzman v. Cicero Mut. Fire Ins. Co.*, 150 Wis. 254, 136 N. W. 604.

So, where a policy in a mutual company provided that, if assessments be not paid within 30 days after the levy of an assessment, the policy should be "null and void," the policy became ipso facto void upon nonpayment within that time and not merely voidable, so that the company could not maintain an action to recover the assessment (*Mutual Fire Co. of Portland v. Maple*, 60 Or. 359, 119 Pac. 484, 38 L. R. A. [N. S.] 726).

1879 (e). Whether notice of assessment had been mailed to the insured is a question for the jury (*Miner v. Farmers' Mut. Fire Ins. Co. of Manistee, Benzie & Mason Counties*, 117 N. W. 211, 153 Mich. 594).

1879-1881. (f) Excuses for nonpayment

1880 (f). Where premium note was sent to a bank for collection, and the maker went to the bank at its customary hour for opening to pay the note, and no one appearing the insured went to his work, having used due diligence to pay the note, and the day not having expired when the property burned at about 10 o'clock

that night, the liability of insurer continued in force (*Crites v. Capital Fire Ins. Co. of Lincoln*, 137 N. W. 847, 91 Neb. 771).

Where the insurer, who was also mortgagee of the premises agreed to attend to the insurance and had done so for a time, and had not notified insured that it would not continue to do so, the failure of the insured to pay the premium, though notified by the agent to do so, would not relieve the company of liability (*Commonwealth Fire Ins. Co. v. Obenchain* [Tex. Civ. App.] 151 S. W. 611).

1881 (f). Where an insurance company gave its agent full power to deliver policies and collect premiums, and treated a premium as paid, it was bound by the agent's act in extending credit to insured for a part of the premium, or in taking out part of it in trade (*Homestead Fire Ins. Co. v. Ison*, 110 Va. 18, 65 S. E. 463). Hence, if credit for a premium on a fire insurance policy is given by an agent of the insured, the mere failure to pay the premium does not defeat a right to recover on the policy.

Cohn v. Mechanics' & Traders' Ins. Co., 175 Ill. App. 594; *Same v. North British & Mercantile Ins. Co.*, Id. 612.

But in order to take advantage of an extension of credit to excuse nonpayment the insured must show, not only that the person making the extension was the insurer's agent, but that the continuing of the policy in force was within the real or apparent scope of his authority. Authority to solicit insurance, receive and write applications, forward them to the insurer's general office, receive and deliver policies, and collect premiums, would not empower an insurance agent to continue in force a policy which by its terms had become null and void because of nonpayment of premium notes when due (*American Ins. Co. v. Hornbarger & Harris*, 108 S. W. 213, 85 Ark. 337).

In *J. P. Lamb & Co. v. Merchants' Nat. Mut. Fire Ins. Co.*, 18 N. D. 253, 119 N. W. 1048, it was held that the secretary of a mutual fire insurance company was without power to waive the terms of its by-laws as to giving credit to members for premiums or assessments.

Where it appeared that the nonpayment was due to a misunderstanding on the part of the insured, who thought that the premium was paid, and who received no notice to the contrary from the insurer until after the loss, and upon whom no demand for payment had been made, though the policy had been executed and delivered

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in accordance with the application, there was a presumption that credit was given and the time of payment extended (*Fenton v. Cascade Mut. Fire Ass'n*, 60 Wash. 389, 111 Pac. 343).

23. SUSPENSION OF RISK AND RELATION OF GROUND OF FORFEITURE TO CAUSE OF LOSS

1883-1885. (b) Suspension of risk by temporary breach of warranty or condition

1884 (b). The rule seems to be well settled in many cases that a mere temporary breach of a stipulation or condition to which there is not attached a specific forfeiture, and which breach does not exist at the time of the loss, will not defeat a recovery on the policy.

Athens Mut. Ins. Co. v. Toney, 1 Ga. App. 492, 57 S. E. 1013; *North British Mercantile Ins. Co. v. Union Stockyards Co.*, 120 Ky. 465, 87 S. W. 285; *President, etc., of Ins. Co. of North America v. Pitts*, 88 Miss. 587, 41 South. 5, 7 L. R. A. (N. S.) 627, 117 Am. St. Rep. 756, 9 Ann. Cas. 54; *Sumter Tobacco Warehouse Co. v. Phoenix Ins. Co.*, 76 S. C. 76, 56 S. E. 654, 10 L. R. A. (N. S.) 736, 121 Am. St. Rep. 941, 11 Ann. Cas. 780; *Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co.*, 59 Wash. 501, 110 Pac. 36, 140 Am. St. Rep. 863, reversing on rehearing 56 Wash. 681, 106 Pac. 194, 28 L. R. A. (N. S.) 593; *Silver v. London Assur. Corporation*, 61 Wash. 593, 112 Pac. 666.

Thus, where a policy prohibits a certain change in the premises, a violation of such provision does not totally avoid the policy, but merely suspends it during such prohibited change (*Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co.*, 59 Wash. 501, 110 Pac. 36, 140 Am. St. Rep. 863, reversing on rehearing 56 Wash. 681, 106 Pac. 194).

1885-1886. (c) Same—Construction of particular conditions

1885 (c). Under a fire policy conditioned to be void if the hazard be increased by any means in the control or knowledge of insured, where extrahazardous conditions on insured premises are permitted by insured for a while, but are removed before the fire, the operation of the policy is merely suspended during the continuance of such conditions, and is restored on their removal (*North British Mercantile Ins. Co. v. Union Stockyards Co.*, 87 S. W. 285, 27 Ky. Law Rep. 852, 120 Ky. 465). So, where, the owner of the building insured rented to a tenant a portion thereof to be used for a business more hazardous than contemplated by the policy, this

did not avoid the policy, where the temporary hazard ended without loss and the loss occurred from another source (*Sumter Tobacco Warehouse Co. v. Phoenix Ins. Co.*, 56 S. E. 654, 76 S. C. 76, 10 L. R. A. [N. S.] 736, 121 Am. St. Rep. 941, 11 Ann. Cas. 780). Under the provision of the policy merely suspending liability of the company while the risk is increased by presence of prohibited gasoline, liability is not affected by prior presence of gasoline removed before the fire (*O'Neill v. Caledonian Ins. Co.*, 166 Cal. 310, 135 Pac. 1121).

1886-1887. (d) Same—Vacancy of premises

1886 (d). In several jurisdictions it has been held that a breach of the condition against vacancy of the insured premises merely suspends the risk, which revives if the premises are again occupied before the loss.

Athens Mut. Ins. Co. v. Toney, 57 S. E. 1013, 1 Ga. App. 492; *President, etc., of Ins. Co. of North America v. Pitts*, 41 South. 5, 88 Miss. 587, 7 L. R. A. (N. S.) 627, 117 Am. St. Rep. 756, 9 Ann. Cas. 54; *Silver v. London Assur. Corporation*, 61 Wash. 593, 112 Pac. 666.

1887 (d). But in Ohio and Pennsylvania the rule seems to be that a breach of the vacancy clause is an actual breach, and not a mere suspension of risk.

Germania Fire Ins. Co. v. Werner, 81 N. E. 980, 76 Ohio St. 543, 12 L. R. A. (N. S.) 456, 118 Am. St. Rep. 891; *Hardiman v. Fire Ass'n of Philadelphia*, 61 Atl. 990, 212 Pa. 333.

1888-1889. (g) Same—Failure to pay premium

1888 (g). A stipulation for a suspension of liability under an insurance policy in case of default in payment of the premium is valid (*McCullough v. Home Ins. Co.*, 100 S. W. 104, 118 Tenn. 263, 12 Ann. Cas. 626). And where the policy provides that the contract shall be void during any time that a premium note shall remain due and unpaid, the operation of the policy is suspended during the period the notes remain unpaid.

Jefferson Mut. Ins. Co. v. Murry, 86 S. W. 813, 74 Ark. 507; *American Ins. Co. v. Hornbarger & Harris*, 108 S. W. 213, 85 Ark. 337.

1889 (g). Where, after the destruction of the property and after forfeiture of the policy for nonpayment of premium, insured paid the amount of the premium to a clerk of the agent who had issued the policy, neither the agent nor clerk having knowledge that the

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property had been destroyed, such payment did not revive the policy (*Johnson v. Continental Ins. Co. of New York*, 119 Tenn. 598, 107 S. W. 688).

1889-1892. (h) Effect of breach of condition as dependent on relation to cause of loss

1889 (h). Notwithstanding the general rule that a temporary breach of condition will not create a forfeiture, it is nevertheless well established that if the loss occurs by reason of the breach, or while the breach continues, the insured cannot recover (*Silver v. London Assur. Corporation*, 61 Wash. 593, 112 Pac. 666). It has, however, been held that it is no defense to an action on a policy insuring a schoolhouse that prior to the fire one of the school trustees who had charge of the schoolhouse stored certain baled hay therein, and that certain raftsmen occupied the schoolhouse at night, neither of which was shown to have had any relation to the fire (*Mississippi Home Ins. Co. v. Stevens*, 93 Miss. 439, 46 South. 245). Courts look with disfavor upon forfeitures, and the trend of modern authority is that a stipulation in policy which might avoid it does not do so if it in no way contributes to the loss, and if conditions provided for therein do not exist at time of loss (*Johnson & Stroud v. Rhode Island Ins. Co.*, 172 N. C. 142, 90 S. E. 124).

1890 (h). It is however, undoubtedly the rule that a breach of warranty renders an insurance contract void even though the breach may have ceased at the time of the loss, where it was the intention that such breach should render the contract void whether it was the cause of the loss or not (*Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co.*, 59 Wash. 501, 110 Pac. 36, 140 Am. St. Rep. 863, reversing judgment 106 Pac. 194, 56 Wash. 681, 28 L. R. A. [N. S.] 593, on rehearing). So, too, where the breach was as to a material stipulation and increased the risk, it has been held to be immaterial whether or not it was directly connected with the cause of loss.

King v. Concordia Fire Ins. Co., 140 Mich. 258, 103 N. W. 616, 6 Ann. Cas. 87 (breach of iron safe clause); *Kenefick v. Norwich Union Fire Ins. Soc.*, 205 Mo. 294, 103 S. W. 957 (pressure of explosives).

1892-1893. (i) Same—Statutory provisions

1893 (i). In view of the Michigan statute (Comp. Laws 1897, § 5180), providing that no policy shall be void for breach of condition if the insurer has not been injured thereby or if the loss has not occurred during such breach or by reason thereof, it was held in

Macatawa Transp. Co. v. Fireman's Fund Ins. Co., 168 Mich. 365, 134 N. W. 193, Ann. Cas. 1913C, 69, that where there was a continuing warranty in a policy on a boat that it should not be within 500 feet of exposing buildings, the policy was void, when, at the time of the burning of the boat, it was within 500 feet of exposing buildings, though such buildings had no influence on the loss; but where exposing buildings had ceased to be such at the time of the fire insured could recover on the policy.

Under the express provisions of Comp. Laws, § 5182, a breach of a condition of a fire policy is not a defense thereto unless a loss shall occur while such breach of condition continues, or such breach is the primary or contributory cause of the loss. *Brunswick-Balke Collender Co. v. Northern Assur. Co.*, 113 N. W. 1113, 150 Mich. 311.

Code Iowa, § 1743, provides that conditions in a contract of insurance making the policy void shall not prevent a recovery thereon by the insured if the failure to observe such provisions, or a violation thereof, does not contribute to the loss. In view of this statute, it has been held that the failure of insured to keep a set of books as required by the policy, and the violation by him of an iron-safe clause contained therein, do not defeat a recovery, where there is neither pleadings nor proof that such matters in any manner contributed to the loss (*Johnson v. Farmers' Ins. Co.*, 102 N. W. 502, 126 Iowa, 565). The statute expressly provides, however, that stipulations referring to vacancy of insured premises shall not be changed or affected by the provision that conditions or stipulations in the application or contract of insurance making the policy void before loss shall not prevent recovery by the insured if it be shown by plaintiff that failure to observe such provision or the violation thereof did not contribute to the loss. It was held in *Cone v. Century Fire Ins. Co.*, 139 Iowa, 205, 117 N. W. 307, that an insurance company is under no obligation to prove that a change of occupancy or use in violation of the policy made the risk more hazardous. On the other hand, it was held in *Seaman v. Anchor Fire Ins. Co.*, 149 Iowa, 583, 128 N. W. 934, that under the statute the plaintiff has the burden of showing that the change, if any, did not cause or contribute to the fire, and defendant has the burden to show that such change, if any, increased the risk. No reference is made in the *Seaman Case* to the prior decision in the *Cone Case*.

The statute also contains an exception to the effect that any condition against removal of the property shall not be affected by the provision, if the removal increased the risk. It was held in *Adams*

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v. Atlas Mut. Ins. Co., 135 Iowa, 299, 112 N. W. 651, that a clause in a policy evidencing an agreement that a removal of the property should increase the risk as a matter of law is void, as against public policy, and that, while the insured is required to show that a removal of the property did not cause or contribute to the loss, the burden is on defendant to show that it increased the risk, as a matter of defense.

The Texas statute (Acts 33d Leg. c. 105, Vernon's Sayles' Ann. Civ. St. 1914, arts. 4874a, 4874b) concerning warranties in fire insurance policy, the breach of which do not contribute to a loss, is constitutional (*McPherson v. Camden Fire Ins. Co.* [Tex. Civ. App.] 185 S. W. 1055). Under this statute it has been held that the keeping of gasoline in contravention of the policy on a stock of goods did not avoid it, where the breach did not contribute to bring about the loss (*Commonwealth Ins. Co. of New York v. Finegold* [Tex. Civ. App.] 183 S. W. 833). But it has been held that the Texas statute did not affect the operation of the iron-safe clause.

Commonwealth Ins. Co. of New York v. Finegold (Tex. Civ. App.) 183 S. W. 833; *McPherson v. Camden Fire Ins. Co.* (Tex. Civ. App.) 185 S. W. 1055; *Westchester Fire Ins. Co. v. McMinn* (Tex. Civ. App.) 188 S. W. 25.

Insurance Code Wash. (Laws 1911, c. 49) § 106, adopting the New York standard form of policy, does not repeal section 34 of the same Code, providing that a breach of warranty shall not avoid the policy unless it contributed to the loss (*E. H. Stanton Co. v. Rochester German Underwriters' Agency* [D. C.] 206 Fed. 978).

**24. EFFECT OF BREACH OF WARRANTY OR CONDITION AS TO
PART OF PROPERTY INSURED—ENTIRE AND
DIVISIBLE CONTRACTS**

1894-1896. (a) General principles

1895 (a). The question of the entirety or divisibility of the insurance can properly arise only when there is a single policy to be considered. Consequently, where the insurer issued two fire policies at different times, one insuring a building and one insuring chattels therein, and each policy provided that it should be void in case of any false swearing by the insured "relating to this insurance, or the subject thereof" false swearing as to one policy did not vitiate the other (*Williams v. Virginia State Ins. Co.*, 55 S. E. 680, 106 Va. 259).

1896-1899. (e) Insurance on separate classes of property separately valued—New York

1898 (c). Where the insurance covers different kinds of property separately valued, the contract is divisible, though one premium is paid and the amount insured is the sum total of the valuations.

Donley v. Glens Falls Ins. Co., 184 N. Y. 107, 76 N. E. 914, 6 Ann. Cas. 81; Id., 100 App. Div. 69, 91 N. Y. Supp. 302; Miller v. Gibbs, 95 N. Y. Supp. 385, 108 App. Div. 103; Baker v. German-American Ins. Co., 133 App. Div. 496, 117 N. Y. Supp. 1104.

1900. (f) Same—Missouri

1900 (f). The rule that a policy covering several classes of property separately valued is divisible is supported in Missouri.

Crossan v. Pennsylvania Fire Ins. Co., 133 Mo. App. 537, 113 S. W. 704; Fager v. Commercial Union Assur. Co., 189 Mo. App. 464, 178 S. W. 1064; La Font v. Home Ins. Co., 193 Mo. App. 543, 182 S. W. 1029.

1900-1901. (g) Same—Texas

1900 (g). The rule that a policy covering separate classes of property separately valued is divisible prevails in Texas.

Mecca Fire Ins. Co. v. Wilderspin (Tex. Civ. App.) 118 S. W. 1131; Mecca Fire Ins. Co. v. Coghlan, 68 Tex. Civ. App. 601, 134 S. W. 266; Spring Garden Ins. Co. v. Brown (Tex. Civ. App.) 143 S. W. 292.

1901-1902. (h) Same—Other states in which the contract is held to be divisible

1901 (h). The contract is regarded as divisible where separate classes of property are separately valued in Florida, Colorado, Michigan, and Washington.

Merchants' Mut. Fire Ins. Co. v. Harris, 51 Colo. 95, 116 Pac. 143; Hartford Fire Ins. Co. v. Hollis, 58 Fla. 268, 50 South. 985; Benham v. Farmers' Mut. Fire Ins. Co., 165 Mich. 406, 131 N. W. 87, L. R. A. 1915D, 736, Ann. Cas. 1912C, 983; Herzog v. Palatine Ins. Co., Ltd., 36 Wash. 611, 79 Pac. 287.

1902-1903. (i) Same—Contrary doctrine

1902 (i). On the other hand, in some states the rule that separate valuations render the contract divisible is rejected.

Carleton v. Patrons' Androscoggin Mut. Fire Ins. Co., 109 Me. 79, 82 Atl. 649, 39 L. R. A. (N. S.) 951; Joffe & Mankowitz v. Niagara Fire Ins. Co., 116 Md. 155, 81 Atl. 281, 51 L. R. A. (N. S.) 1047, Ann. Cas. 1913C, 1217; Clymer Opera Co. v. Rural Valley Mut. Fire

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Ins. Co., 50 Pa. Super. Ct. 645; *Fries, Breslin Co. v. Star Fire Ins. Co. (C. C.)* 150 Fed. 611, judgment affirmed 154 Fed. 35, 83 C. C. A. 147.

1903-1906. (j) Same—Policy covering real and personal property

1903 (j). The rule that the contract is divisible when the policy covers different classes of property separately valued has been applied where real and personal property are insured in one policy, and no distinction seems to have been drawn between the effect of a breach as to either class of property.

National Union Fire Ins. Co. v. Cubberly, 68 Fla. 253, 87 South. 133; *Benham v. Farmers' Mut. Fire Ins. Co.*, 165 Mich. 406, 131 N. W. 87, L. R. A. 1915D, 736, Ann. Cas. 1912C, 983; *Turner v. Home Ins. Co.*, 195 Mo. App. 138, 189 S. W. 626; *Shockey v. Fidelity-Phenix Fire Ins. Co. of New York (Mo. App.)* 191 S. W. 1049; *Donley v. Glens Falls Ins. Co.*, 91 N. Y. Supp. 302, 100 App. Div. 69; *Baker v. German-American Ins. Co. of New York*, 117 N. Y. Supp. 1104, 133 App. Div. 496; *Ennis v. Retail Merchants' Ass'n Mut. Fire Ins. Co.*, 33 N. D. 20, 156 N. W. 234; *Oatman v. Bankers' & Merchants' Mut. Fire Relief Ass'n*, 66 Or. 388, 133 Pac. 1183, rehearing denied 66 Or. 388, 134 Pac. 1033; *State Mut. Fire Ins. Co. v. Kellner (Tex. Civ. App.)* 169 S. W. 636; *Ætna Ins. Co. v. Dancer (Tex. Civ. App.)* 181 S. W. 772; *Fisher v. Sun Ins. Co. of London*, 74 W. Va. 694, 83 S. E. 729, L. R. A. 1915C, 619. Contra, see *Carleton v. Patrons' Androscoggin Mut. Fire Ins. Co.*, 109 Me. 79, 82 Atl. 649, 39 L. R. A. (N. S.) 951; *Clymer Opera Co. v. Rural Valley Mut. Fire Ins. Co.*, 50 Pa. Super. Ct. 645; *Fries-Breslin Co. v. Star Fire Ins. Co.*, 154 Fed. 35, 83 C. C. A. 147, affirming (C. C.) 150 Fed. 611.

1906 (j). In *Hartford Fire Ins. Co. v. Hollis*, 58 Fla. 268, 50 South. 985, it was held that in an action on a combination mercantile and building policy issued on a single consideration, where defendant pleaded a provision in the policy that, unless otherwise provided by agreement indorsed thereon, the policy should be void if, with the knowledge of insured, foreclosure proceedings be commenced or notice given of sale of the insured property by virtue of any mortgage, and that such foreclosure proceedings were commenced, the question as to whether the policy could be treated as divisible, if it could be raised in the case, should be raised by specific grounds of demurrer; and demurrers alleging that the pleas do not show that the alleged mortgage was executed by plaintiff or with his knowledge or consent, nor that he was connected with the foreclosure proceedings, that it was not shown that the hazard of

the building insured was increased by such proceedings, nor that there was any change in the title to the insured property since the issuance of the policy were insufficient to raise the question.

1906-1907. (k) Same—Policy covering several buildings

1907 (k). Where one insurance policy upon several buildings, which practically constitutes one risk, provided that it shall be void as to every part if a building therein described is vacant for more than 10 days, that provision goes to the entire contract, and if one building is vacant longer than 10 days, the whole insurance lapses even though the amount of insurance on each building is specified (*Mecca Fire Ins. Co. v. Coghlan*, 63 Tex. Civ. App. 601, 134 S. W. 266).

In *Towle v. Dirigo Mut. Fire Ins. Co.*, 107 Me. 317, 78 Atl. 374, it was held that, where a fire policy provided that it should be void if insured had or should thereafter take any other insurance on the property without the assent of the insurer, or if, without such assent, the property should be sold, and insured devised the insured property to her son, who sold it to his father, who obtained additional insurance on the dwelling house, but not on a barn situated on the premises, the policy was avoided, at least as to the dwelling house, by the procuring of the additional insurance and as to all of the property by the sale.

1907-1909. (l) Same—Policy covering different classes of personal property

1908 (l). In *Spring Garden Ins. Co. v. Brown* (Tex. Civ. App.) 143 S. W. 292, it was held that a policy on a stock of merchandise for a specified sum, and on store and furniture and fixtures for a specified sum which stipulates that the entire policy shall be void if the subject of insurance be incumbered by chattel mortgage, is not invalidated, as to the insurance on the furniture and fixtures, by the execution of a chattel mortgage on the "stock of merchandise" and improvements, the mortgage not covering the furniture and fixtures; "stock," in mercantile law, being defined as "the goods which a tradesman holds for sale or traffic," and "merchandise" being defined to be "the objects of commerce." On the other hand, in *Joffe & Mankowitz v. Niagara Fire Ins. Co.*, 116 Md. 155, 81 Atl. 281, 51 L. R. A. (N. S.) 1047, Ann. Cas. 1913C, 1217, it was held that a policy insuring stock and fixtures was entire, so that a breach of the iron-safe clause rendered the policy void as to the fixtures as well as to the stock.

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1909-1912. (m) Character of contract determined by entirety of consideration

1909 (m). In some jurisdictions the determining factor is the character of the consideration, and it is held that if the premium is entire the contract is entire, though the policy covers different classes of property separately valued.

Reference may be made to *Johnson v. Sun Fire Ins. Co.*, 60 S. E. 118, 3 Ga. App. 430; *St. Landry Wholesale Mercantile Co. v. New Hampshire Fire Ins. Co.*, 38 South. 87, 114 La. 146, 3 Ann. Cas. 821; *Parsons, Rich & Co. v. Lane*, 106 N. W. 485, 97 Minn. 98, 4 L. R. A. (N. S.) 231, 7 Ann. Cas. 1144.

1912-1913. (n) Same—Contrary doctrine

1912 (n). The rule that if the premium is entire the contract is entire is rejected in many jurisdictions.

Reference may be made to *Hartford Fire Ins. Co. v. Hollis*, 64 Fla. 89, 59 South. 785; *Benham v. Farmers' Mut. Fire Ins. Co.*, 131 N. W. 87, 165 Mich. 406, L. R. A. 1915D, 736, Ann. Cas. 1912C, 983; *Crosman v. Pennsylvania Fire Ins. Co.*, 113 S. W. 704, 133 Mo. App. 537; *Donley v. Glens Falls Ins. Co.*, 76 N. E. 914, 184 N. Y. 107, 6 Ann. Cas. 81; *Miller v. Gibbs*, 95 N. Y. Supp. 385, 108 App. Div. 108.

1914. (p) Effect of condition that entire policy shall be void—Condition cannot control when policy is otherwise divisible

1914 (p). A breach of a fire policy as to one of the items of property insured will not avoid the entire policy, where the items are separately valued and insured in separate amounts, notwithstanding it is provided that the entire policy shall be void if insured shall conceal or misrepresent any material fact.

Sullivan v. Mercantile Town Mut. Ins. Co., 20 Okl. 460, 94 Pac. 676, 129 Am. St. Rep. 761; *Arkansas Ins. Co. v. Cox*, 21 Okl. 873, 98 Pac. 552, 20 L. R. A. (N. S.) 775, 129 Am. St. Rep. 808.

1916-1917. (r) Same—Development of the Texas rule

1916 (r). An insurance policy on household goods, which provided that it should be void if the subject of insurance, being personal property, should be or become incumbered by a mortgage, is not rendered void by a mortgage on a part of the property at the time the policy was executed, where the value of the unincumbered portion exceeds the amount of the insurance on all the goods, as "subject of insurance" means all property covered by the policy (*Mecca Fire Ins. Co. of Waco v. Wilderspin* [Tex. Civ. App.] 118 S. W. 1131).

1923-1925. (w) Divisibility of contract dependent on divisibility of risk—Application of the rule in other states

1923 (w). Where a policy of insurance is issued, covering different classes of property, and each class is insured for a specific sum, a breach of the contract as to one or more classes does not avoid the policy as to other classes, in the absence of fraud, or some act condemned by public policy, or an increase of risk on the whole property insured, because of the breach as to a part (*Herzog v. Palatine Ins. Co., Limited, England*, 79 Pac. 287, 36 Wash. 611).

1924 (w). The rule that, where the policy covers different classes of property, the contract must be regarded as entire, if the risk is practically the same on all classes of property, is supported by several cases.

Mecca Fire Ins. Co. v. Coghlan, 63 Tex. Civ. App. 601, 134 S. W. 266;
Brehm Lumber Co. v. Svea Ins. Co., 79 Pac. 34, 36 Wash. 520, 68 L. R. A. 109.

So in *Goorberg v. Western Assur. Co.*, 150 Cal. 510, 89 Pac. 130, 10 L. R. A. (N. S.) 876, 119 Am. St. Rep. 246, 11 Ann. Cas. 801, the policy insured for a specified sum a dwelling, and for a specified sum household goods therein, and stipulated that the "entire policy" should be void if the interest of the insured in the property was not truly stated. The building was located on unsurveyed government land, and the insured made misrepresentations with respect to his title to the realty. It was held that the policy was entire, without reference to the fact that the premium was entire, and without reference to the use of the word "entire," for the risk to the contents of the house was affected by the circumstances which affected the risk to the building itself. In *Coggins v. Ætna Ins. Co.*, 144 N. C. 7, 56 S. E. 506, 8 L. R. A. (N. S.) 839, 119 Am. St. Rep. 924, the insured in a policy covering a storehouse and a stock of goods therein, failed to comply with the iron-safe clause of the policy. The policy, the premium of which was entire, provided that a failure to produce the set of books and inventories required by the contract rendered the policy void, and constituted a perpetual bar to any recovery thereon. The contract also provided that the goods were insured while contained in the storehouse and not elsewhere. It was held that the insured's failure to comply with the iron-safe clause precluded him from recovery on the policy, not as to the stock alone, but as to the storehouse as well, although the policy placed a definite portion of the insurance on the building, since the risks on the goods and on the building were substantially identical.

XII. AVOIDANCE OF CONTRACT FOR CONCEALMENT, MISREPRESENTATION, OR BREACH OF WARRANTY—LIFE AND ACCIDENT INSURANCE

1. DISTINCTION BETWEEN WARRANTIES AND REPRESENTATIONS

1931-1932. (a) In general—Definition of warranties and representations

1931 (a). The words, "representation" and "warranty," are by no means equivalent.

Minnesota Mut. Life Ins. Co. v. Link, 131 Ill. App. 89; *Same v. Miller*, Id.; *Same v. Welsh*, 82 N. E. 637, 230 Ill. 273.

A representation is not part of the contract, but is collateral thereto, while a warranty enters into and forms part of the contract, defining by particular stipulation the precise limits of the obligation assumed by the insurer.

National Annuity Ass'n v. Carter, 96 Ark. 495, 132 S. W. 633; *Spence v. Central Accident Ins. Co.*, 236 Ill. 444, 86 N. E. 104, 19 L. R. A. (N. S.) 88; *Nash v. Eddy*, 184 Ill. App. 375; *Metropolitan Life Ins. Co. v. Goodman*, 10 Ala. App. 446, 65 South. 449; *Pelican v. Mutual Life Ins. Co.*, 44 Mont. 277, 119 Pac. 778.

1932 (a). The terms "warranty" and "condition precedent" are often used interchangeably, and in many instances a warranty is a condition precedent to the taking effect of the contract (*Salts v. Prudential Ins. Co.*, 140 Mo. App. 142, 120 S. W. 714).

A warranty stipulates for the absolute truth of the statement made while a representation need be only substantially true in so far as it is material to the risk.

Metropolitan Life Ins. Co. v. Johnson, 105 Ark. 101, 150 S. W. 393; *Keatley v. Grand Fraternity*, 2 Boyce (Del.) 511, 82 Atl. 204; *Spence v. Central Accident Ins. Co.*, 86 N. E. 104, 236 Ill. 444, 19 L. R. A. (N. S.) 88; *Catholic Order of Foresters v. Collins*, 51 Ind. App. 285, 99 N. E. 745; *United States Casualty Co. v. Campbell*, 148 Ky. 554, 146 S. W. 1121; *Mutual Life Ins. Co. v. Mullan*, 107 Md. 457, 69 Atl. 385; *Salts v. Prudential Ins. Co.*, 140 Mo. App. 142, 120 S. W. 714; *Claver v. Woodmen of the World*, 152 Mo. App. 155, 133 S. W. 153; *Pelican v. Mutual Life Ins. Co.*, 44 Mont. 277, 119 Pac. 778; *Hoeland v. Western Union Life Ins. Co.*, 58 Wash.

100, 107 Pac. 866. But compare *Kansas City Life Ins. Co. v. Blackstone* (Tex. Civ. App.) 143 S. W. 702; *Nash v. Eddy*, 184 Ill. App. 375; *New York Life Ins. Co. v. Moats*, 207 Fed. 481, 125 C. C. A. 143; *Prudential Ins. Co. of America v. Sellers*, 54 Ind. App. 326, 102 N. E. 894; *Kasprzyk v. Metropolitan Life Ins. Co.*, 140 N. Y. Supp. 211, 79 Misc. Rep. 263; *Murphy v. National Travelers' Benefit Ass'n (Iowa)* 161 N. W. 57, L. R. A. 1917C, 338; *Miller v. National Casualty Co.*, 62 Pa. Super. Ct. 417.

In *Rasicot v. Royal Neighbors*, 18 Idaho, 85, 108 Pac. 1048, 29 L. R. A. (N. S.) 433, 138 Am. St. Rep. 180, it was said that, where the applicant specifically warrants the literal truth of the answers to questions submitted, the statements in the application are warranties. However, it would seem that the mere use of the word "warranty," or "warrant," in relation to the effect to be given to the statements and answers of the applicant, is not conclusive that the answers are warranties.

O'Connor v. Grand Lodge, A. O. U. W., 146 Cal. 484, 80 Pac. 688; *North American Acc. Ins. Co. v. Rehacek*, 123 Ill. App. 219; *Court of Honor v. Clark*, 125 Ill. App. 490; *Berner v. Brotherhood of American Yeomen*, 154 Ill. App. 27.

1933. (b) Statements made part of policy

1933 (b). Statements and stipulations contained in or expressly made a part of the policy are warranties, in the absence of statutes to the contrary.

Crosse v. Supreme Lodge Knights and Ladies of Honor, 254 Ill. 80, 98 N. E. 261, 45 L. R. A. (N. S.) 162; *Central Acc. Ins. Co. v. Spence*, 126 Ill. App. 32; *Peckham v. Modern Woodmen*, 151 Ill. App. 95; *Cessna v. United States Life Endowment Co.*, 152 Ill. App. 653; *Modern Woodmen of America v. Angle*, 127 Mo. App. 94, 104 S. W. 297; *Silcox v. Grand Fraternity*, 79 N. J. Law, 502, 76 Atl. 1018; *Supreme Lodge Knights and Ladies of Honor v. Payne*, 101 Tex. 449, 108 S. W. 1160, 15 L. R. A. (N. S.) 1277; *Modern Woodmen of America v. Owens*, 60 Tex. Civ. App. 398, 130 S. W. 858; *Hoeland v. Western Union Life Ins. Co.*, 58 Wash. 100, 107 Pac. 866; *Kelper v. Equitable Life Assur. Soc. (C. C.)* 159 Fed. 206; *Mutual Life Ins. Co. of New York v. Morgan*, 39 Okl. 205, 135 Pac. 279; *Green v. National Annuity Ass'n*, 90 Kan. 523, 135 Pac. 586. Though an application for life insurance is made a part of the policy, its purpose is to hold the insured to the warranty of the truthfulness of his answers, but it confers no rights on the beneficiaries named therein. *Burt v. Burt*, 67 Atl. 210, 218 Pa. 196, 11 Ann. Cas. 708.

It necessarily follows that, in order that a statement shall be given the effect of a warranty, it must appear in the policy, or, if contained in the application, it must be referred to in such a manner as to make it a part of the policy.

Metropolitan Life Ins. Co. v. Johnson, 105 Ark. 101, 150 S. W. 393; *Spence v. Central Accident Ins. Co.*, 236 Ill. 444, 86 N. E. 104, 19 L. R. A. (N. S.) 88; *Catholic Order of Foresters v. Collins*, 51 Ind. App. 285, 99 N. E. 745; *Richards v. King*, 107 N. Y. Supp. 720, 57 Misc. Rep. 177.

An application for insurance, a copy of which is attached to the policy issued pursuant thereto, is a part of the policy, where such application contains statements of fact which constitute warranties. *Columbian Exposition Salvage Co. v. Union Casualty & Surety Co. of St. Louis*, 123 Ill. App. 245, judgment affirmed 77 N. E. 128, 220 Ill. 172.

If the blanks upon the back of a policy for warranties were neither signed by the applicant, nor even filled out, the policy cannot be avoided for breach of warranty (*Frankel v. United States Casualty Co.* [Sup.] 115 N. Y. Supp. 631). So, where the soliciting agent filled out and signed an application for an illiterate person without informing him of its contents, the statements therein were not warranties (*O'Rourke v. John Hancock Mut. Life Ins. Co.* [Dist. Ct.] 30 N. Y. Supp. 215). But in *Everson v. General Fire & Life Assur. Corp.*, 202 Mass. 169, 88 N. E. 658, it was held that statements contained in a rider attached to a policy, though not signed by the insured were warranties.

Statements in an application for life insurance must be treated as representations, and not as warranties, where the policy provides that it was issued on an application omitting warranties (*Metropolitan Life Ins. Co. v. Johnson*, 49 Ind. App. 233, 94 N. E. 785).

Insurance Law N. Y. § 58, stating the requisites of insurance contracts, requires that the policy itself shall contain physically the entire contract, so that all statements which are warranties on their face must be incorporated in the policy or be abandoned as warranties (*Archer v. Equitable Life Assur. Soc. of United States*, 112 N. E. 433, 218 N. Y. 18, affirming 154 N. Y. Supp. 519, 169 App. Div. 43).

1933-1935. (c) Sufficiency of reference to make application or answers part of policy—Application as consideration or basis of policy

1934 (c). In some cases it has been held that, in a recital that the statements of the insured in the application constitute the "consideration" of the contract or the "basis" of the policy, such statements are warranties.

Reference may be made to *Krause v. Modern Woodmen*, 133 Iowa, 199, 110 N. W. 452; *Scofield's Adm'x v. Metropolitan Life Ins. Co.*, 64 Atl. 1107, 79 Vt. 161, 8 Ann. Cas. 1152.

But the weight of authority seems to be that such a reference to the statements contained in the application is insufficient to make them warranties as part of the policy.

Spence v. Central Accident Ins. Co., 236 Ill. 444, 86 N. E. 104; *Reppond v. National Life Ins. Co.*, 100 Tex. 519, 101 S. W. 786, 11 L. R. A. (N. S.) 961, 15 Ann. Cas. 618, reversing (Tex. Civ. App.) 96 S. W. 778; *Turner v. Modern Woodmen of America*, 186 Ill. App. 404.

Where the answers made by insured to insurer's medical examiner were not referred to in the policy, nor made a part of the application, such answers were not within Pennsylvania Act May 11, 1881 (P. L. 20), requiring policies containing any reference to the application of the insured, etc., to contain a correct copy thereof, and declaring that unless so attached such application, etc., should not be received in evidence, nor be considered as a part of the policy (*Hews v. Equitable Life Assur. Soc. of United States*, 143 Fed. 850, 74 C. C. A. 676).

1935-1937. (d) Same—Recitals which make statements in application part of policy

1935 (d). Where the application warrants the answers and statements therein to be full and true, and the policy recites that it is issued in consideration of the statements and warranties in the application, and that the application should be regarded as part of the contract, such statements and answers are warranties.

Prudential Ins. Co. v. Hummer, 36 Colo. 208, 84 Pac. 61; *Pacific Mut. Life Ins. Co. v. Glaser*, 245 Mo. 377, 150 S. W. 549, 45 L. R. A. (N. S.) 222; *Eminent Household of Columbian Woodmen v. Prater*, 24 Okl. 214, 103 Pac. 558, 23 L. R. A. (N. S.) 917, 20 Ann. Cas. 287; *Germania Life Ins. Co. of New York City v. Klein*, 137 Pac. 73, 25 Colo. App. 326.

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As was said in *Spence v. Central Accident Ins. Co.*, 236 Ill. 444, 86 N. E. 104, 19 L. R. A. (N. S.) 88, a recital in a policy that it is issued in consideration of the warranties and agreements in the application and of a specified sum is a mere acknowledgment by the insurer of a valuable consideration, which is so far binding as to preclude either party from destroying the legal effect of the policy by showing that no consideration was given, but it does not make the application a part of the policy. If the policy by express terms makes the application a part of the contract, or if it declares that the application is the basis on which the contract is made, or if the policy is declared to be issued on the faith of the application, representations in the application are a part of the policy and are warranties, but a mere reference to the application in the policy, without indicating a purpose to make it a part of the policy, is insufficient to change statements in the application from representations into warranties.

1937 (d). A warranty, indorsed on a policy and referred to in the body thereof as indorsed thereon, is plainly expressed in the policy, within Code 1907, § 4579, forbidding warranties or other stipulations of the application to be made a part of the policy by reference, but must be "plainly expressed therein" (*Hunt v. Preferred Accident Ins. Co. of New York*, 172 Ala. 442, 55 South. 201).

If the application is not only referred to in the certificate, but the statements and stipulations imposed therein are expressly and specifically made a part of the certificate, the contract of insurance is represented by the application, by the certificate, the examination of the physician, and the constitution and by-laws of the society (*Peckham v. Modern Woodmen of America*, 151 Ill. App. 95). And if an application for life insurance was incorporated in a policy by reference, the term "application" should be construed to include all the statements on both pages thereof, except the medical examiner's report (*Paquette v. Prudential Ins. Co.*, 79 N. E. 250, 193 Mass. 215).

1937-1939. (e) Same—Part of papers not referred to in policy

1937 (e). Where statements made in an application for membership in a benefit society were not incorporated in and made a part of the certificate, the statements are mere representations and

not warranties (*Gurley v. Massac County Mut. Relief Ass'n*, 186 Ill. App. 492).

1939-1941. (f) Application of general principles of construction

1939 (f). The general rule that statements made a part of the contract are warranties is true in a limited sense only and must be qualified by the further rule to the effect that, in determining whether a statement made a part of the contract is a warranty regard should be had to the form of expression used, the apparent purpose of its insertion in the contract, the connection or relation between it and other parts of the instrument, and the intent of the parties as manifested by the papers.

Metropolitan Life Ins. Co. v. Johnson, 105 Ark. 101, 150 S. W. 393; *Goff v. Supreme Lodge Royal Achates*, 90 Neb. 578, 134 N. W. 239, 37 L. R. A. (N. S.) 1191; *Reppond v. National Life Ins. Co.*, 100 Tex. 519, 101 S. W. 786, 11 L. R. A. (N. S.) 981, 15 Ann. Cas. 618, reversing (Tex. Civ. App.) 96 S. W. 778.

While it is true that a warranty in insurance must necessarily appear in the contract itself, courts will not construe a statement as a warranty unless the language of the policy is so clear as to preclude any other construction.

Spence v. Central Accident Ins. Co., 236 Ill. 444, 86 N. E. 104, 19 L. R. A. (N. S.) 88; *Metropolitan Life Ins. Co. v. Johnson*, 49 Ind. App. 233, 94 N. E. 785; *Nash v. Eddy*, 184 Ill. App. 375; *Hunter v. United States Fidelity & Guaranty Co.*, 167 S. W. 692, 129 Tenn. 572; *Weisguth v. Supreme Tribe of Ben Hur*, 112 N. E. 350, 272 Ill. 541, affirming 194 Ill. App. 17; *Teepie v. Fraternal Bankers' Reserve Society (Iowa)* 161 N. W. 102, L. R. A. 1917C, 858.

The use of the word "warranty" is not necessarily conclusive.

O'Connor v. Grand Lodge A. O. U. W. of California, 80 Pac. 688, 146 Cal. 484; *North American Acc. Ins. Co. v. Rehacek*, 123 Ill. App. 219; *Court of Honor v. Clark*, 125 Ill. App. 490; *Berner v. Brotherhood of American Yeomen*, 154 Ill. App. 27; *Reppond v. National Life Ins. Co.*, 100 Tex. 519, 101 S. W. 786, 11 L. R. A. (N. S.) 981, 15 Ann. Cas. 618, reversing (Tex. Civ. App.) 96 S. W. 778.

1940 (f). If it does not clearly appear that the statements are intended as warranties, they will be considered as representations merely, though the contract states that they are warranties.

Minnesota Mut. Life Ins. Co. v. Link, 82 N. E. 637, 230 Ill. 273; *Crosse v. Supreme Lodge Knights & Ladies of Honor*, 254 Ill. 80, 98 N. E. 261, 45 L. R. A. (N. S.) 162; *Court of Honor v. Clark*, 125 Ill. App. 490; *Kidder v. Supreme Assembly of American Stars of Equ-*

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ty, 154 Ill. App. 489; *Goff v. Supreme Lodge Royal Achates*, 90 Neb. 578, 134 N. W. 239, 37 L. R. A. (N. S.) 1191; *Logan v. Provident Sav. Life Assur. Soc.*, 50 S. E. 529, 57 W. Va. 384.

Warranties cannot be created or extended by construction.

Catholic Order of Foresters v. Collins, 51 Ind. App. 285, 99 N. E. 745; *Green v. National Annuity Ass'n*, 90 Kan. 523, 135 Pac. 586; *Holand v. Western Union Life Ins. Co.*, 58 Wash. 100, 107 Pac. 866.

But the language of the contract is to be construed in the most favorable light possible to avoid a forfeiture.

Keatley v. Grand Fraternity, 2 Boyce (Del.) 267, 78 Atl. 874; *Catholic Order of Foresters v. Collins*, 51 Ind. App. 285, 99 N. E. 745; *Sargent v. Modern Brotherhood of America*, 148 Iowa, 600, 127 N. W. 52; *Wright v. Fraternities Health & Accident Ass'n*, 107 Me. 418, 78 Atl. 475, 32 L. R. A. (N. S.) 461; *MacKinnon v. Fidelity & Casualty Co.*, 72 N. J. Law, 29, 60 Atl. 180; *Owen v. Metropolitan Life Ins. Co.*, 74 N. J. Law, 770, 67 Atl. 25, 122 Am. St. Rep. 413; *Mutual Life Ins. Co. v. Ford*, 61 Tex. Civ. App. 412, 130 S. W. 769, writ of error denied 103 Tex. 522, 131 S. W. 406; *Logan v. Provident Sav. Life Assur. Soc.*, 57 W. Va. 384, 50 S. E. 529; *French v. Fidelity & Casualty Co.*, 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011.

1941-1943. (g) Inconsistent recitals

1941 (g). If the reference to the statements made by the insured is in any way inconsistent with the idea of a warranty, such statements will be regarded as representations, though made a part of the contract.

O'Connor v. Grand Lodge A. O. U. W., 146 Cal. 484, 80 Pac. 688; *Prudential Ins. Co. v. Lear*, 31 App. D. C. 184. And see *Crosse v. Supreme Lodge Knights & Ladies of Honor*, 254 Ill. 80, 98 N. E. 261, 45 L. R. A. (N. S.) 162; *Guarantee Life Ins. Co. v. Evert* (Tex. Civ. App.) 178 S. W. 643; *Stillman v. Aetna Life Ins. Co.* (D. C.) 240 Fed. 462.

Thus in *O'Connor v. Grand Lodge A. O. U. W.*, 146 Cal. 484, 80 Pac. 688, it was held that where the medical examination on an application for membership in a benefit society made the answers of the applicant warranties, and the constitution of the society provided that the certificate should be void if the applicant should willfully make any erroneous statement, or should intentionally conceal any material fact, the provisions of the contract were conflicting, leaving it in doubt whether it was intended that the answers should be literally true, or only that they should not be will-

fully erroneous, and, as the doubt was created by the society, the assured was relieved from the obligation of a strict warranty.

1943-1944. (h) Same—Reference to statements as representations

1943 (h). If the statements of the applicant are referred to merely as representations, they will be so construed, though they are warranted to be true. Thus the answers to questions in an application will be construed representations instead of warranties, where the application states, "I have read the foregoing application and fully understand the same, and have answered all the foregoing questions and warrant the truth of such answers, and it is fully understood that, should this application be accepted and policy issued, it is done solely upon representations herein named" (Nash v. Eddy, 184 Ill. App. 375).

1944-1945. (i) Same—Qualifying provisions

1944 (i). A statement will not be regarded as a warranty if the declaration is qualified by provisions limiting its effect (Minnesota Mut. Life Ins. Co. v. Link, 131 Ill. App. 89, affirmed in 230 Ill. 273, 82 N. E. 637). But the intention to qualify the statement must clearly appear. Thus in Supreme Lodge Knights & Ladies of Honor v. Payne (Tex. Civ. App.) 110 S. W. 523, the policy contained a declaration of insured that the foregoing answers and statements and the answers to questions propounded to her by the medical examiner were warranted to be true, and contained a declaration of insured to the medical examiner that answers as written in the medical examiner's certificate were as given by her, followed by the words "and that I have not made any misstatements or concealed any facts in relation to my past or present condition, family history, or age." It was held that the quoted language did not qualify the language preceding it so as to require only good faith on insured's part in answering the medical examiner's questions. So, in National Life Ins. Co. v. Reppond (Tex. Civ. App.) 96 S. W. 778, where the application provided that the statements made by the insured in the application were warranted to be true, and "without suppression of any fact * * * which would tend to influence the company in issuing a policy" under the application, and stipulated that the insured warranted that he had reviewed all answers made to questions asked in the application, and that the answers were true, it was held that the quoted words did not modify the warranty and make the answers of the insured mere representations.

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1946-1948. (j) Same—Statements based on knowledge, belief, or opinion

1946 (j). Statements in the application will not be regarded as absolute warranties, if from the language used it is evident that such statements are based wholly on the knowledge, belief, or opinion of the applicant. Such statements are at most warranties of the good faith of the applicant.

Basicot v. Royal Neighbors, 18 Idaho, 85, 108 Pac. 1048, 29 L. R. A. (N. S.) 433, 138 Am. St. Rep. 180; *Kidder v. Supreme Assembly of American Stars of Equity*, 154 Ill. App. 489; *Raymer v. Modern Brotherhood*, 157 Ill. App. 510; *Iowa Life Ins. Co. v. Haughton*, 46 Ind. App. 467, 87 N. E. 702, reversing on rehearing (Ind. App.) 85 N. E. 127; *Rupert v. Supreme Court of United Order of Foresters*, 94 Minn. 293, 102 N. W. 715; *Owen v. Metropolitan Life Ins. Co.*, 74 N. J. Law, 770, 67 Atl. 25, 122 Am. St. Rep. 413; *Home Circle Soc. No. 2 v. Shelton* (Tex. Civ. App.) 85 S. W. 320; *Collins v. Catholic Order of Foresters*, 43 Ind. App. 549, 88 N. E. 87. And see *Blenke v. Citizens Life Ins. Co.*, 145 Ky. 332, 140 S. W. 561; *Murray v. Brotherhood of American Yeomen* (Iowa) 163 N. W. 421.

So, where insured, before receiving a policy was required to execute a certificate of continued good health, such certificate was a representation and not a warranty (*Massachusetts Mut. Life Ins. Co. v. Crenshaw*, 195 Ala. 263, 70 South. 768).

1948-1949. (k) Same—Nonresponsive or partial answers

1948 (k). If the answer is not responsive, it is a representation merely, and an incomplete answer is a warranty only so far as it is responsive.

Peterson v. Manhattan Life Ins. Co., 244 Ill. 329, 91 N. E. 466, 18 Ann. Cas. 96, reversing 115 Ill. App. 421; *Smith v. Bankers' Life Ass'n*, 123 Ill. App. 392; *Haughton v. Aetna Life Ins. Co. of Hartford, Conn.*, 42 Ind. App. 527, 85 N. E. 125, rehearing denied 42 Ind. App. 527, 85 N. E. 1050; *Everson v. General Fire & Life Assur. Corp.*, 202 Mass. 169, 88 N. E. 658; *O'Connor v. Modern Woodmen*, 110 Minn. 18, 124 N. W. 454, 25 L. R. A. (N. S.) 1244; *Hanrahan v. Metropolitan Life Ins. Co.*, 72 N. J. Law, 504, 63 Atl. 280; *Keatley v. Grand Fraternity* (D. C.) 198 Fed. 264.

But in order that the rule should apply it must appear that the answers are really incomplete (*Nedved v. Court of Honor*, 183 Ill. App. 390).

MISREPRESENTATION OR BREACH OF WARRANTY 1950-1951

1949-1950. (1) Distinction as dependent on materiality

1949 (1). There are a few cases which apparently hold that, in determining whether a statement is a representation or a warranty, the materiality of such statement is an important, if not a controlling, factor.

This doctrine seems to be supported by *North American Acc. Ins. Co. v. Rehacek*, 123 Ill. App. 219, and *Great Hive Ladies of Modern Maccabees v. Hodge*, 130 Ill. App. 1. But see *Sargent v. Modern Brotherhood*, 148 Iowa, 600, 127 N. W. 52.

Under a policy providing, as required by Rev. St. Tex. 1911, art. 4741, subd. 4, that statements in the application, in the absence of fraud, should be representations, and not warranties, a statement as to a material matter fraudulently made would be construed as a warranty (*American Nat. Ins. Co. v. Anderson* [Tex. Civ. App.] 179 S. W. 66).

2. EFFECT OF MISREPRESENTATION OR BREACH OF WARRANTY AS DEPENDENT ON MATERIALITY AND ON KNOWLEDGE AND INTENT OF APPLICANT

1950-1951. (a) Effect of breach of warranty in general

1950 (a). If the fact warranted is not true, there is a breach of warranty which forfeits the policy.

Fitzgerald v. Metropolitan Life Ins. Co., 90 Vt. 291, 98 Atl. 498; *Guarrala v. Metropolitan Life Ins. Co.* (N. J.) 101 Atl. 298; *Mcmanus v. Peerless Casualty Co.*, 95 Atl. 510, 114 Me. 98; *Kribs v. United Order of Foresters*, 177 S. W. 766, 191 Mo. App. 524; *Baltimore Life Ins. Co. v. Floyd*, 5 Boyce (Del.) 431, 94 Atl. 515, affirming 5 Boyce (Del.) 201, 91 Atl. 653; *National Annuity Ass'n v. Carter*, 96 Ark. 495, 132 S. W. 633; *Prudential Ins. Co. v. Hummer*, 36 Colo. 208, 84 Pac. 61; *McGreery v. National Union*, 152 Ill. App. 62; *Cessna v. United States Life Endowment Co.*, 152 Ill. App. 653; *Supreme Lodge K. P. v. Bradley*, 141 Ky. 334, 132 S. W. 547, reversing on rehearing (Ky.) 117 S. W. 275; *Rupert v. Supreme Court of United Order of Foresters*, 102 N. W. 715, 94 Minn. 293; *Floyd v. Modern Woodmen of America*, 166 Mo. App. 166, 148 S. W. 178; *Pelican v. Mutual Life Ins. Co.*, 44 Mont. 277, 119 Pac. 778; *Silcox v. Grand Fraternity*, 79 N. J. Law, 502, 76 Atl. 1018; *Hoeland v. Western Union Life Ins. Co. of Spokane*, 58 Wash. 100, 107 Pac. 866; *Daffron v. Modern Woodmen of America*, 190 Mo. App. 303, 176 S. W. 498; *Sovereign Camp Woodmen of the World v. Lillard* (Tex. Civ. App.) 174 S. W. 619. But compare *Kansas City Life Ins. Co. v. Blackstone* (Tex. Civ. App.) 143 S. W. 702.

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So, if a statement in an application for insurance warranted to be true is false as far as it goes, but fails to answer the whole inquiry, there is a breach of warranty which avoids the policy, and the insurer waives an answer to that part of the inquiry only which is left unanswered (*Hanrahan v. Metropolitan Life Ins. Co.*, 63 Atl. 280, 72 N. J. Law, 504). But if by reason of an ambiguity resulting from the form in which a question has been cast by an insurer the answer of the applicant, which becomes a warranty, may state the truth or may state a falsehood according as the ambiguity is resolved, that construction should be adopted that is most strongly against the party responsible for the ambiguity (*MacKinnon v. Fidelity & Casualty Co.*, 60 Atl. 180, 72 N. J. Law, 29).

1951-1952. (b) Same—Materiality of facts warranted

1951 (b). Where there is a breach of warranty, the policy is avoided, though the statement on which the breach is predicated is in no way material to the risk.

Metropolitan Life Ins. Co. v. Goodman, 65 South. 449, 10 Ala. App. 446; *National Annuity Ass'n v. Carter*, 96 Ark. 495, 132 S. W. 633; *Prudential Ins. Co. v. Hummer*, 84 Pac. 61, 36 Colo. 208; *Grand Fraternity v. Keatley*, 4 Boyce (Del.) 308, 88 Atl. 553, reversing 2 Boyce (Del.) 511, 82 Atl. 294; *Peckham v. Modern Woodmen of America*, 151 Ill. App. 95; *Harvick v. Modern Woodmen*, 158 Ill. App. 570; *Catholic Order of Foresters v. Collins*, 51 Ind. App. 285, 99 N. E. 745; *Sovereign Camp Woodmen of the World v. Latham*, 59 Ind. App. 290, 107 N. E. 740; *Goff v. Mutual Life Ins. Co. of New York*, 59 South. 28, 131 La. 98; *Mutual Life Ins. Co. of New York v. Mullan*, 107 Md. 457, 69 Atl. 385; *Standard Accident & Life Ins. Co. v. Wood*, 116 Md. 575, 82 Atl. 702; *Salts v. Prudential Ins. Co.*, 140 Mo. App. 142, 120 S. W. 714; *Claver v. Woodmen of the World*, 152 Mo. App. 155, 133 S. W. 153; *Pelican v. Mutual Life Ins. Co. of New York*, 44 Mont. 277, 119 Pac. 778; *National Life Ins. Co. v. Reppond* (Tex. Civ. App.) 96 S. W. 778, judgment reversed *Reppond v. National Life Ins. Co.*, 100 Tex. 519, 101 S. W. 786, 11 L. R. A. (N. S.) 981, 15 Ann. Cas. 618. And see *Fidelity Mut. Life Ins. Co. v. Beck*, 84 Ark. 57, 104 S. W. 533, rehearing denied 84 Ark. 57, 104 S. W. 1102. See, also, *Sargent v. Modern Brotherhood*, 148 Iowa, 600, 127 N. W. 52; *Commercial Bank v. American Bonding Co.*, 194 Mo. App. 224, 187 S. W. 99; *Citizens' Nat. Life Ins. Co. v. Swords*, 109 Miss. 635, 68 South. 920; *Murphy v. National Travelers' Benefit Ass'n* (Iowa) 161 N. W. 57, L. R. A. 1917C, 338; *Fitzgerald v. Metropolitan Life Ins. Co.*, 90 Vt. 291, 98 Atl. 498.

1952 (b). The theory is that by his warranty the applicant impliedly agrees that the statement is material.

Hunt v. Preferred Accident Ins. Co. of New York, 172 Ala. 442, 55 South. 201; *Crosse v. Supreme Lodge, Knights and Ladies of Honor*, 254 Ill. 80, 98 N. E. 261, 45 L. R. A. (N. S.) 162; *Holland v. Western Union Life Ins. Co. of Spokane*, 58 Wash. 100, 107 Pac. 866.

1952-1953. (c) Effect of misrepresentation—Materiality of facts

1952 (c). To avoid the policy on the ground that there has been a misrepresentation, the false statement must be of some fact material to the risk.

Empire Life Ins. Co. v. Gee, 178 Ala. 492, 60 South. 90; *Crosse v. Supreme Lodge Knights and Ladies of Honor*, 254 Ill. 80, 98 N. E. 261, 45 L. R. A. (N. S.) 162; *Catholic Order of Foresters v. Collins*, 51 Ind. App. 285, 99 N. E. 745; *Goff v. Mutual Life Ins. Co.*, 131 La. 98, 59 South. 28; *Mutual Life Ins. Co. of New York v. Mullan*, 107 Md. 457, 69 Atl. 385; *Pelican v. Mutual Life Ins. Co.*, 44 Mont. 277, 119 Pac. 778; *Bankers' Union of the World v. Mixon*, 103 N. W. 1049, 74 Neb. 36; *Holland v. Western Union Life Ins. Co.*, 58 Wash. 100, 107 Pac. 866; *Groffinger v. Metropolitan Life Ins. Co.*, 183 Ill. App. 618; *Baltimore Life Ins. Co. v. Floyd*, 5 Boyce (Del.) 201, 91 Atl. 653; *Mutual Life Ins. Co. of New York v. Morgan*, 39 Okl. 205, 135 Pac. 279; *Metropolitan Life Ins. Co. v. Goodman*, 65 South. 449, 10 Ala. App. 446; *National Union v. Sherry*, 180 Ala. 627, 61 South. 944. Compare *Sargent v. Modern Brotherhood*, 148 Iowa, 600, 127 N. W. 52. An insurance company could not resist a recovery on a life policy by reason of alleged false representations in an application for a different policy. *Aaronson v. New York Life Ins. Co.*, 142 N. Y. Supp. 568, 81 Misc. Rep. 228; *Murphy v. National Travelers' Benefit Ass'n (Iowa)* 161 N. W. 57, L. R. A. 1917C, 338; *Fitzgerald v. Metropolitan Life Ins. Co.*, 90 Vt. 291, 98 Atl. 498; *Atlas Life Assur. Co. v. Moman*, 14 Ala. App. 400, 69 South. 989; *Mutual Aid Union v. Blacknall (Ark.)* 196 S. W. 792; *Moore v. Prudential Casualty Co.*, 156 N. Y. Supp. 892, 170 App. Div. 849.

1953 (c). It naturally follows that, if the representation is false and material, the policy may be avoided.

Mutual Life Ins. Co. v. Allen, 166 Ala. 159, 51 South. 877; *Ætna Life Ins. Co. v. Conway*, 75 S. E. 915, 11 Ga. App. 557; *Spence v. Central Accident Ins. Co.*, 86 N. E. 104, 236 Ill. 444, 19 L. R. A. (N. S.) 88; *Bagby v. Court of Honor*, 151 Ill. App. 371; *Kotek v. Court of Honor*, 152 Ill. App. 92; *Walsh v. John Hancock Mut. Life Ins. Co.*, 162 Ill. App. 436; *Western & Southern Life Ins. Co. v. Quinn*, 130 Ky. 397, 113 S. W. 456; *United States*

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Health & Accident Ins. Co. v. Jolly (Ky.) 118 S. W. 281; Mutual Life Ins. Co. v. Mullan, 107 Md. 457, 69 Atl. 385; Fidelity Mut. Life Ins. Co. v. Miazza, 93 Miss. 18, 46 South. 817, 136 Am. St. Rep. 534; Hoke v. National Life & Accident Ins. Co., 103 Miss. 269, 60 South. 218; Royal Neighbors of America v. Wallace, 102 N. W. 1020, 73 Neb. 409, reversing on rehearing 5 Neb. (Unof.) 519, 99 N. W. 256; Strickland v. Peerless Casualty Co., 90 Atl. 974, 112 Me. 100; Aaronson v. New York Life Ins. Co., 142 N. Y. Supp. 568, 81 Misc. Rep. 228; National Council of Knights and Ladies of Security v. Wilson, 143 S. W. 1000, 147 Ky. 293; Schas v. Equitable Life Assur. Society, 81 S. E. 1014, 166 N. C. 55; Kasprzyk v. Metropolitan Life Ins. Co., 140 N. Y. Supp. 211, 79 Misc. Rep. 263. See, also, Jefferson v. Supreme Tent of Knights of Maccabees of the World, 152 Ill. App. 242.

A misrepresentation in insurance is defined to be "the statement of something as a fact which is untrue in fact and which the insured states, knowing it to be untrue, with the intent to deceive the insurers, or which he states positively as true without knowing it to be true and which has a tendency to mislead, such fact in either case being material to the risk and adverse to the insurers" (United States Fidelity & Guaranty Co. v. First Nat. Bank, 137 Ill. App. 382, judgment affirmed 84 N. E. 670, 233 Ill. 475). In order to defeat the claim of a person insured who has paid the consideration required for the insurance received upon the ground that the insured made misrepresentations as to the risk in his application, it is incumbent upon the company to show that the representations were his, and not mistakes or misrepresentations of its own (Hewey v. Metropolitan Life Ins. Co., 62 Atl. 600, 100 Me. 523).

In Owen v. Metropolitan Life Ins. Co., 74 N. J. Law, 770, 67 Atl. 25, 122 Am. St. Rep. 413, it was said that representations, in an application for life insurance, concerning matters of fact presumably within the knowledge of the applicant, are to be treated as warranties, a breach of which will render the policy void. But false representations as to matters future and false representations as to matters not relied upon do not justify rescission (Samuels v. Life Ass'n of America, 152 Ill. App. 245).

Parties to an insurance contract may make a fact material which would otherwise be immaterial, or make immaterial a fact otherwise material (Rupert v. Supreme Court of United Order of Foresters, 102 N. W. 715, 94 Minn. 293). But a provision in a policy that the truthfulness of each statement contained in the application, by whomsoever written, is material to the risk, and it is the sole

basis of the contract, and that any concealment or untrue statement or answer made or contained therein shall ipso facto avoid the policy, is ineffectual to make every statement contained in the application material to the risk, or avoid the policy, because of an immaterial misstatement (*Fidelity Mut. Life Ins. Co. v. Miazza*, 93 Miss. 18, 46 South. 817, 136 Am. St. Rep. 534). The materiality of a statement generally depends on whether the fact to which the statement relates affects the risk, or influences the insurer in accepting or rejecting the application, or in fixing the rate of premium.

Provident Sav. Life Assur. Soc. v. Whayne's Adm'r, 93 S. W. 1049, 29 Ky. Law Rep. 160; *United States Health & Accident Ins. Co. v. Bennett's Adm'r*, 105 S. W. 438, 32 Ky. Law Rep. 235; *United States Health & Accident Ins. Co. v. Jolly* (Ky.) 118 S. W. 281; *United States Casualty Co. v. Campbell*, 148 Ky. 554, 146 S. W. 1121; *Goff v. Mutual Life Ins. Co. of New York*, 50 South. 28, 131 La. 98; *Mutual Life Ins. Co. v. Mullan*, 107 Md. 457, 69 Atl. 385; *Caffrey v. Knights and Ladies of Columbia*, 63 Atl. 189, 213 Pa. 609.

A "material representation" in an application for insurance is one that would influence a prudent insurer in determining whether to accept the risk, or in fixing the amount of the premium (*Empire Life Ins. Co. v. Jones*, 82 S. E. 62, 14 Ga. App. 647).

Every fact which is untruly stated or wrongfully suppressed in an application for insurance must be regarded as material, if knowledge or ignorance thereof would reasonably influence the underwriter in estimating the character of the risk, or in fixing the premium (*Gardner v. North State Mut. Life Ins. Co.*, 79 S. E. 806, 163 N. C. 367, 48 L. R. A. [N. S.] 714, Ann. Cas. 1915B, 652).

Both at common law and under Revisal 1905, § 4808, any representation in an application for life insurance is material, if the knowledge or ignorance of it would reasonably influence the judgment of the insurer in making the contract, or in fixing the rate of premium (*Schas v. Equitable Life Assur. Society*, 81 S. E. 1014, 166 N. C. 55).

Under Revisal 1905, § 4808, a materially false statement in an application for insurance will avoid the policy, if it is calculated to influence the insurer, where the latter had no knowledge of the falsity either in making the contract, in estimating the risk, or in fixing the premium (*Gardner v. North State Mut. Life Ins. Co.*, 79 S. E. 806, 163 N. C. 367, 48 L. R. A. [N. S.] 714, Ann. Cas. 1915B, 652).

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"Material to the risk," as used in Rev. St. 1911, art. 4834, means any fact concerning the health, condition, or physical history of the applicant which would naturally have influenced the insurer in determining whether to issue the certificate (*Modern Brotherhood of America v. Jordan* [Tex. Civ. App.] 167 S. W. 794).

1954-1955. (d) Breach of warranty as affected by knowledge and intent of applicant

1954 (d). A breach of warranty avoids the policy, whether the false statement on which it is predicated was innocently or intentionally made.

Cessna v. United States Life Endowment Co., 152 Ill. App. 653; *Satterlee v. Modern Brotherhood*, 15 N. D. 92, 106 N. W. 561; *Modern Woodmen of America v. Owens*, 60 Tex. Civ. App. 398, 130 S. W. 858; *Collins v. Catholic Order of Foresters*, 43 Ind. App. 549, 88 N. E. 87; *Grand Fraternity v. Keatley*, 4 Boyce (Del.) 308, 88 Atl. 553, reversing judgment 82 Atl. 294, 2 Boyce, 511.

1955-1956. (e) Same—Qualified warranties

1955 (e). Under warranty by the applicant of the truth of representations made by her, "to the best of my knowledge and belief," validity of the insurance does not depend upon the representations being substantially true without regard to her knowledge and belief (*Yeomen of America v. Rott*, 140 S. W. 1018, 145 Ky. 604).

1956-1957. (f) Misrepresentation as affected by knowledge and intent of applicant

1956 (f). It is a general principle, subject, however, to some qualification that to avoid a policy for misrepresentation, the false statement must have been made willfully and with intent to deceive.

Empire Life Ins. Co. v. Gee, 178 Ala. 492, 60 South. 90; *Globe Mut. Life Ins. Ass'n v. March*, 118 Ill. App. 261; *Raymer v. Modern Brotherhood*, 157 Ill. App. 510; *Metropolitan Life Ins. Co. v. Johnson*, 49 Ind. App. 233, 94 N. E. 785; *Pelican v. Mutual Life Ins. Co.*, 44 Mont. 277, 119 Pac. 778; *Bryant v. Modern Woodmen*, 86 Neb. 372, 125 N. W. 621, 27 L. R. A. (N. S.) 326, 21 Ann. Cas. 365; *Diehl v. Mutual Life Ins. Co.*, 176 Ill. App. 462; *Feeney v. National Council Knights and Ladies of Security*, 172 Ill. App. 51; *Nedved v. Court of Honor*, 183 Ill. App. 390; *Groffinger v. Metropolitan Life Ins. Co.*, 183 Ill. App. 618; *New York Life Ins. Co. v. Moats*, 207 Fed. 481, 125 C. C. A. 143; *Prudential Ins. Co. of America v. Sellers*, 54 Ind. App. 326, 102 N. E. 894; *Kasprzyk v. Metropolitan Life Ins. Co.*, 140 N. Y. Supp. 211, 79 Misc. Rep. 263; *Mutual Life Ins. Co. of New*

MISREPRESENTATION OR BREACH OF WARRANTY 1957-1958

York v. Hilton-Green, 211 Fed. 31, 127 C. C. A. 467; *Baltimore Life Ins. Co. v. Floyd*, 5 Boyce (Del.) 431, 94 Atl. 515, affirming 5 Boyce (Del.) 201, 91 Atl. 653; *Mutual Life Ins. Co. of New York v. Hilton-Green*, 36 Sup. Ct. 676, 241 U. S. 613, 60 L. Ed. 1202, reversing 211 Fed. 31, 127 C. C. A. 467.

So it was said in *Metropolitan Life Ins. Co. v. Johnson*, 49 Ind. App. 233, 94 N. E. 785, that, where the insurer relied on misrepresentations by insured in her application, insured's knowledge and good faith could be considered. And in *Kennedy v. Prudential Ins. Co.*, 177 Ill. App. 50, it was said that where an insurance policy provides that all statements made by the insured shall in the absence of fraud be deemed representations and not warranties, and "no statement shall avoid the policy," etc., the words "no such statement" refer to the provision as to "all statements made in the absence of fraud."

But it is undoubtedly the rule in many instances that if a question propounded to an applicant for life insurance was material and the answer was untrue, no recovery could be had on the policy, whether the applicant knew it was untrue or not.

Germania Life Ins. Co. of New York City v. Klein, 137 Pac. 73, 25 Colo. App. 326; *United States Fidelity & Guaranty Co. v. First Nat. Bank*, 137 Ill. App. 382, judgment affirmed 84 N. E. 670, 233 Ill. 475; *Western & Southern Life Ins. Co. v. Quinn*, 130 Ky. 397, 113 S. W. 456; *Mutual Life Ins. Co. of New York v. Mullan*, 107 Md. 457, 69 Atl. 385.

So it was said in *Fidelity Mut. Life Ins. Co. v. Miazza*, 93 Miss. 18, 46 South. 817, 136 Am. St. Rep. 534, that if an applicant for insurance undertakes to make a positive statement of a fact material to the risk, such fact must be true, in fact, or the policy will be avoided; it being insufficient that he believes it to be true.

1957-1958. (g) Same—Statements made in good faith

1957 (g). Where the answer, upon any fair interpretation of the meaning of a question in a benefit certificate application as it might have been understood by the applicant, may be deemed a true answer, no forfeiture of rights should be permitted (*Erickson v. Ladies of the Maccabees of the World*, 25 S. D. 183, 126 N. W. 259). So, too, a representation respecting a matter not material, though false, if made in good faith, does not avoid the policy (*Baltimore Life Ins. Co. v. Floyd*, 5 Boyce [Del.] 201, 91 Atl. 653). And generally, when a misrepresentation is practically immaterial, or only remotely bears on the materiality of the risk, insured's good

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faith in making the statement should have been given considerable weight.

Farragher v. Knights and Ladies of Security, 159 Pac. 3, 98 Kan. 601; *Kasprzyk v. Metropolitan Life Ins. Co.*, 140 N. Y. Supp. 211, 79 Misc. Rep. 263.

In *Marshall v. Locomotive Engineers' Mut. Life & Accident Ins. Ass'n* (W. Va.) 90 S. E. 847, it was held that, where applicant for policy of fraternal insurance made false statements and was guilty of legal fraud, the policy would be avoided, though he did not intend to deceive; for legal fraud exists when insured makes a false statement as to a matter which insurer must necessarily regard as made on personal knowledge.

1958-1960. (h) Same—Statements based on knowledge or belief

1958 (h). Where the questions propounded call for expressions of opinion or judgment or the statements are based on knowledge and belief the knowledge and good faith of the applicant are the determining factors.

Pelican v. Mutual Life Ins. Co., 44 Mont. 277, 119 Pac. 778; *Royal Neighbors of America v. Wallace*, 102 N. W. 1020, 73 Neb. 409, reversing on rehearing 5 Neb. (Unof.) 519, 99 N. W. 256; *Bryant v. Modern Woodmen of America*, 125 N. W. 621, 86 Neb. 872, 27 L. R. A. (N. S.) 326, 21 Ann. Cas. 365; *Cunningham v. Modern Brotherhood of America*, 96 Neb. 827, 148 N. W. 918.

But see *Berman v. Fraternities Health & Accident Ass'n*, 107 Me. 368, 78 Atl. 462, where it was held that under the provision as to the truth of insured's answer, truth in fact was required, and that an answer which was in fact untrue was given by him for the truth according to his belief or understanding could not avoid a forfeiture thereunder.

1960. (i) Same—Negligence in making statements

1960 (i). Where a copy of the application is set out in an insurance policy, it is the duty of the insured to know that the representations therein contained, and which constitute the inducement for the issuance of the policy, are true (*Bonewell v. North American Accident Ins. Co.*, 132 N. W. 1067, 167 Mich. 274, Ann. Cas. 1913A, 847, affirming judgment on rehearing 125 N. W. 59, 160 Mich. 137).

1960-1961. (j) Statutory provisions limiting effect of breach of warranty or misrepresentation

1961 (j). A misrepresentation of a material fact vitiates a policy, whether or not knowingly made, notwithstanding Laws N. Y.

1906, c. 326, § 16, providing that all statements purporting to be made by insured shall, in the absence of fraud, be deemed representations and not warranties; such provision applying only to immaterial facts (*Rakov v. Bankers' Life Ins. Co. of New York*, 176 App. Div. 918, 162 N. Y. Supp. 539).

1961-1962. (k) Misrepresentation or breach of warranty as avoiding policy ipso facto

1961 (k). The insurance contract is not ipso facto void by reason of misrepresentation or breach of warranty, but is voidable at the option of the insurer.

Ætna Life Ins. Co. v. Bockting, 39 Ind. App. 586, 79 N. E. 524; *United States Health & Accident Ins. Co. v. Clark*, 41 Ind. App. 345, 83 N. E. 760.

1962 (k). In many jurisdictions the insurer, to take advantage of an alleged misrepresentation or breach of warranty, must return or tender the premiums received.

Meridian Life Ins. Co. v. Dean, 182 Ala. 127, 62 South. 90, Id., 184 Ala. 673, 62 South. 94; *Modern Woodmen of America v. Vincent*, 82 N. E. 475, 40 Ind. App. 711, 14 Ann. Cas. 89, denying rehearing of 40 Ind. App. 711, 80 N. E. 427, 14 Ann. Cas. 89; *Catholic Order of Foresters v. Collins*, 51 Ind. App. 285, 99 N. E. 745; *Thompson v. Royal Neighbors of America*, 154 Mo. App. 109, 133 S. W. 146; *Welsh v. Metropolitan Life Ins. Co. of New York*, 165 Mo. App. 233, 147 S. W. 147; *Provident Sav. Life Assur. Soc. v. Wayne's Adm'r*, 93 S. W. 1049, 29 Ky. Law Rep. 160. But see *Knights of Maccabees of the World v. Shields*, 162 S. W. 778, 157 Ky. 35, 49 L. R. A. (N. S.) 860, denying rehearing 160 S. W. 1043, 156 Ky. 270, 49 L. R. A. (N. S.) 853. An insurance company may set up the defense that the insured misrepresented the condition of his health, though it did not offer to return premiums paid. *Perry v. Metropolitan Life Ins. Co.*, 168 App. Div. 275, 153 N. Y. Supp. 459.

1963. (m) Incontestable policies

1963 (m). The defense that statements made in an application for insurance are warranties and were false cannot be made to a policy which contains an incontestable clause. The only defense which will defeat such a policy is that of fraud in the procurement (*Peoria Life Ass'n v. Hines*, 132 Ill. App. 642). So, where a clause in a certain policy provides that it "shall be incontestable after one year from its date of issue," such clause precludes defenses of mis-

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representation, such as a defense that the insured misrepresented the fact that he had been rejected by another insurance company (*Weil v. Federal Life Ins. Co.*, 182 Ill. App. 322).

3. PLEADING AND PRACTICE WITH REFERENCE TO WARRANTIES AND REPRESENTATIONS IN GENERAL

1964-1965. (a) Necessity of pleading truth of warranties and representations

1964 (a). The complaint in an action on a life policy, which was delivered and became operative, need allege only the contract of insurance, the happening of the contingency whereby the insurer became liable, and the amount of indemnity demanded; it being for defendant to plead and prove any noncompliance with a condition on which its liability depends (*Grand Lodge, A. O. U. W., v. Taylor*, 99 Pac. 570, 44 Colo. 373). And in *Modern Order of Prætorians v. Taylor*, 60 Tex. Civ. App. 217, 127 S. W. 260, it was said that there was no variance between the petition setting up the legal effect of the certificate and alleging a positive obligation and the certificate containing conditions and provisos on which liability was made to depend; it being defendant's duty, if it relied on any of the matters in the provisos to defeat recovery, to plead the same. So in several states it is held that a general allegation of the performance of conditions is sufficient.

Anchor Life Ins. Co. v. Meyer, 61 Ind. App. 35, 111 N. E. 436; *Supreme Tent, Knights of the Maccabees of the World, v. Ethridge*, 43 Ind. App. 475, 87 N. E. 1049; *McKeon v. Ehringer*, 48 Ind. App. 226, 95 N. E. 604; *Federal Casualty Co. v. Taylor*, 53 Ind. App. 565, 102 N. E. 146; *Squires v. Modern Brotherhood of America*, 68 Or. 336, 135 Pac. 774; *Sovereign Camp of W. O. W. v. Hodges*, 72 Fla. 467, 73 South. 847.

But the complaint must show the performance of every condition by the insured and the beneficiary; an allegation of performance by the beneficiary being insufficient (*Grand Lodge A. O. U. W. of Indiana v. Hall*, 76 N. E. 1029, 37 Ind. App. 371). Under the express provisions of *Comp. Laws Okl. 1909, § 3784*, the plaintiff is relieved from alleging the performance of promissory warranties or conditions subsequent and need allege performance only of conditions precedent (*Great Western Life Ins. Co. v. Sparks*, 38 Okl. 395, 132 Pac. 1092, 49 L. R. A. [N. S.] 724).

It is not incumbent on the plaintiff to anticipate defenses based on misrepresentation or breach of warranty.

Supreme Lodge K. P. v. Lipscomb, 50 Fla. 406, 39 South. 637; Ferrandini v. Bankers' Life Ass'n of Des Moines, 51 Wash. 442, 99 Pac. 6.

The sufficiency of the complaint under the Oklahoma practice is considered in Continental Casualty Co. v. Wynne, 36 Okl. 325, 129 Pac. 18.

1965-1966. (b) Necessity of pleading specially a breach of warranty or misrepresentation

1965 (b). To be available as a defense a breach of warranty or misrepresentation must be specially pleaded by the insurer.

Grand Lodge, A. O. U. W., v. Taylor, 44 Colo. 373, 99 Pac. 570; Southern Life Ins. Co. v. Logan, 9 Ga. App. 503, 71 S. E. 742; Carmichael v. John Hancock Mut. Life Ins. Co., 95 N. Y. Supp. 587, 48 Misc. Rep. 386; Modern Order of Pretorians v. Taylor, 60 Tex. Civ. App. 217, 127 S. W. 260; Ferrandini v. Bankers' Life Ass'n of Des Moines, 51 Wash. 442, 99 Pac. 6; Monahan v. Metropolitan Life Ins. Co., 180 Ill. App. 390; Metropolitan Life Ins. Co. v. Goodman, 196 Ala. 304, 71 South. 409; Fairfield v. Union Life Ins. Co., 196 Ill. App. 7; Jennings v. National American (Mo. App.) 179 S. W. 789.

1966 (b). Such defenses cannot be shown under a general denial.

American Ins. Co. v. Egyptian Lodge No. 802, I. O. O. F., 128 Ill. App. 161; Royal Neighbors of America v. Sinon, 135 Ill. App. 599; Krause v. Modern Woodmen of America, 133 Iowa, 199, 110 N. W. 452.

Fraud in the procurement of an insurance policy not under seal need not be specially pleaded; evidence thereof being admissible under the general issue (Bowyer v. Continental Casualty Co., 72 W. Va. 333, 78 S. E. 1000).

1966-1968. (c) Form and sufficiency of plea

1967 (c). A plea which avers that the application recited that insured applied for a policy to be based on a statement of facts warranted to be true, and which undertakes to set out the balance of the contract in its entirety according to its legal effect, and which alleges that the statement and warranty were untrue in particulars enumerated, sufficiently avers a warranty and a breach thereof as against a demurrer (Hunt v. Preferred Acc. Ins. Co. of New York, 172 Ala. 442, 55 South. 201). Where the only pleas on which issue was joined charged that the policy was obtained on fraudulent

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statements by insured, which he knew to be fraudulent when he made the application, such pleas did not raise the question of breach of warranty, and involved only misrepresentations material to the risk (*Providence Saving Life Ins. Soc. v. Pruett*, 157 Ala. 540, 47 South. 1019).

An actual intent to deceive is not sufficiently averred by merely alleging the making of a statement with knowledge of its falsity (*Massachusetts Mut. Life Ins. Co. v. Crenshaw*, 186 Ala. 460, 65 South. 65). So, too, pleas which fail to show with certainty wherein the alleged misrepresentations by insured in his application for life insurance were false are demurrable (*Mutual Life Ins. Co. of New York v. Witte*, 190 Ala. 327, 67 South. 263).

A defense that the policy was issued in reliance on statements, representations, and answers of the insured as to his previous medical history, which were fraudulent, not full and fair, and effected concealments material to the risk, is insufficient in law for failing to show that the representations were included in the policy (*Archer v. Equitable Life Assur. Society of United States*, 112 N. E. 433, 218 N. Y. 18, affirming 154 N. Y. Supp. 519, 169 App. Div. 43).

1969-1974. (f) Evidence—Burden of proof

1969 (f). Since noncompliance with the conditions of an insurance policy is a matter of defense, there is no burden on plaintiff to prove, in the first instance strict compliance with such terms (*Frieron v. United States Casualty Co.*, 100 S. C. 162, 84 S. E. 535). And while a plaintiff must prove the issue of the policy, payment of premiums, death of insured, and general compliance with the terms and conditions of the policy, the burden is on the insurer to prove a misrepresentation or breach of warranty, avoiding the policy.

Reference may be made to the following cases: *Supreme Lodge K. P. v. Lipscomb*, 39 South. 637, 50 Fla. 406; *Iowa Life Ins. Co. v. Haughton*, 46 Ind. App. 467, 87 N. E. 702, reversing on rehearing 85 N. E. 127; *Collins v. Catholic Order of Foresters*, 43 Ind. App. 549, 88 N. E. 87; *Biermann v. Guaranty Mut. Life Ins. Co.*, 142 Iowa, 341, 120 N. W. 963; *Sargent v. Modern Brotherhood of America*, 148 Iowa, 600, 127 N. W. 52; *Supreme Lodge K. of P. v. Bradley*, 132 S. W. 547, 141 Ky. 334, reversing judgment on rehearing 117 S. W. 275; *National Protective Legion v. Allphin*, 133 S. W. 788, 141 Ky. 777; *Cole v. Mutual Life Ins. Co.*, 129 La. 704, 56 South. 645, Ann. Cas. 1913B, 748; *Forwood v. Prudential Ins. Co.*, 117 Md. 254, 83 Atl. 169; *Monahan v. Metropolitan Life Ins. Co.*, 180 Ill. App. 390; *Monjeau v. Metropolitan Life Ins. Co.*, 94

N. E. 302, 208 Mass. 1; *Adams v. Modern Woodmen of America*, 145 Mo. App. 207, 130 S. W. 113; *Bathe v. Metropolitan Life Ins. Co.*, 152 Mo. App. 87, 132 S. W. 743; *Frazier v. Same*, 161 Mo. App. 709, 141 S. W. 936; *Higgins v. Supreme Castle of Highland Nobles*, 120 N. W. 137, 83 Neb. 504; *Goff v. Supreme Lodge Royal Achates*, 90 Neb. 578, 134 N. W. 239, 37 L. R. A. (N. S.) 1191; *Francis v. Mutual Life Ins. Co.*, 55 Or. 280, 106 Pac. 323; *Huestess v. South Atlantic Life Ins. Co.*, 70 S. E. 403, 88 S. C. 31; *Scofield's Adm'r v. Metropolitan Life Ins. Co.*, 64 Atl. 1107, 79 Vt. 161, 8 Ann. Cas. 1152; *Life Ins. Co. of Virginia v. Halrston*, 108 Va. 832, 62 S. E. 1057, 128 Am. St. Rep. 969; *Knapp v. Order of Pendo*, 79 Pac. 209, 86 Wash. 601; *Ferrandini v. Bankers' Life Ass'n of Des Moines*, Iowa, 99 Pac. 6, 51 Wash. 442; *Logan v. Provident Sav. Life Assur. Soc. of New York*, 57 W. Va. 384, 50 S. E. 529; *Harris v. National Council Junior Order United American Mechanics*, 168 N. C. 357, 84 S. E. 405; *Feinman v. United States Grand Lodge Order Brith Abraham*, 87 Misc. Rep. 327, 149 N. Y. Supp. 862; *Reserve Loan Life Ins. Co. v. Boreing*, 163 S. W. 1085, 157 Ky. 730; *Diehl v. Mutual Life Ins. Co. of New York*, 176 Ill. App. 462. And also to show materiality of statements and fraudulent intent of the insured. *Aetna Life Ins. Co. of Hartford, Conn., v. Millar*, 113 Md. 686, 78 Atl. 483; *Spoerl v. Modern Brotherhood of America*, 184 Ill. App. 32; *Mutual Life Ins. Co. of New York v. Owen*, 111 Ark. 554, 164 S. W. 720; *Metropolitan Life Ins. Co. v. De Vault's Adm'r*, 109 Va. 392, 63 S. E. 982, 17 Ann. Cas. 27. But compare *Metropolitan Life Ins. Co. v. Wolford*, 49 Ind. App. 392, 97 N. E. 444. And see *Knapp v. Brotherhood of American Yeoman*, 139 Iowa, 136, 117 N. W. 298, holding that in an action on a certificate of insurance, after plaintiff had alleged generally the performance of all conditions on her part, as required by Code, § 3626, and defendant, as provided by section 3628, had made specific denial as to the performance of a particular condition, specifically stating in what respect plaintiff had failed to comply, the burden rested on plaintiff to prove the performance of such condition precedent or waiver thereof; *Teegarden v. Supreme Tribe of Ben Hur*, 190 Ill. App. 474; *Loesch v. Supreme Tribe of Ben Hur (Tex. Civ. App.)* 190 S. W. 506; *Sovereign Camp of Woodmen of the World v. Hutchins (Okl.)* 159 Pac. 920; *Wanerka v. Supreme Council of the Royal Arcanum (Sup.)* 159 N. Y. Supp. 697; *Baker v. Metropolitan Life Ins. Co.*, 106 S. C. 419, 91 S. E. 324; *Feinberg v. New York Life Ins. Co.*, 256 Pa. 61, 100 Atl. 538; *Mutual Aid Union v. Blacknall (Ark.)* 196 S. W. 792; *Remfry v. Mutual Life Ins. Co. of New York (Mo. App.)* 196 S. W. 775; *Metropolitan Life Ins. Co. v. Jennings*, 130 Md. 622, 101 Atl. 608; *Collins v. Casualty Co. of America*, 112 N. E. 634, 224 Mass. 327, L. R. A. 1916E, 1203; *McEwen v. Occidental Life Ins. Co.*, 172 Cal. 6, 155 Pac. 86.

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If the defendant relies on the falsity of representations or breach of warranties that appear only in the application, it is incumbent on it to produce the application or satisfactorily to account for its nonproduction and to introduce a proved copy (*Monahan v. Metropolitan Life Ins. Co.*, 180 Ill. App. 390).

1974-1975. (g) Same—Admissibility in general

1974 (g). In an action on a certificate of insurance issued by a fraternal order, it was error to exclude the application for insurance and the proofs of death furnished by the beneficiary, offered by the order to establish the false and fraudulent character of the representations made in the application (*Supreme Lodge K. P. v. Bradley*, 109 S. W. 1178, 33 Ky. Law Rep. 413, modifying 107 S. W. 209). The report of the examining physician is competent evidence on the issue whether insured's answers as to her health at the time she signed the application were true (*Perry v. John Hancock Mut. Life Ins. Co.*, 106 N. W. 860, 143 Mich. 290). But testimony as to the sickness of insured after the policy was issued is inadmissible to establish misrepresentations, in the absence of an offer to show that the conditions existed when the application was made (*Mutual Life Ins. Co. of New York v. Witte*, 190 Ala. 327, 67 South. 263).

In several states the statute provides that the application shall not be admissible in evidence unless a copy thereof is attached to the policy. Under such statutes, if the application is referred to as part of the contract, but no copy thereof is attached to the policy, such application cannot be introduced in evidence to show misrepresentation or breach of warranty.

Biermann v. Guaranty Mut. Life Ins. Co., 142 Iowa, 341, 120 N. W. 963; *Paulhamus v. Security Life & Annuity Co.* (C. C.) 163 Fed. 554; *McCaslin v. Metropolitan Life Ins. Co.*, 59 Pa. Super. Ct. 475; *Hicks v. Metropolitan Life Ins. Co.*, 196 Mo. App. 162, 190 S. W. 661; *Stillman v. Aetna Life Ins. Co.* (D. C.) 240 F. 462.

So, too, if the copy of the application attached to policies did not contain a certain question and answer, and no copy of the declarations and answers in which they were found was annexed to the policy, as required by the statute, the question and answer are properly excluded (*Paquette v. Prudential Ins. Co. of America*, 79 N. E. 250, 193 Mass. 215). But the fact that no copy of the application is attached to the policy does not affect the right of the insurer to show breach of warranties or conditions

contained in the policy itself (*Kirkpatrick v. London Guarantee & Accident Co.*, 139 Iowa, 370, 115 N. W. 1107, 19 L. R. A. [N. S.] 102). Neither does the failure to attach a copy of the application to the policy make it inadmissible for the purpose of showing actual fraud.

Johnson v. American Nat. Life Ins. Co., 68 S. E. 731, 134 Ga. 800; *Southern Life Ins. Co. v. Hill*, 70 S. E. 186, 8 Ga. App. 857; *Holden v. Prudential Ins. Co. of America*, 77 N. E. 306, 191 Mass. 153; *Hews v. Equitable Life Assur. Soc. of United States*, 143 Fed. 850, 74 C. C. A. 676; *Bowyer v. Continental Casualty Co.*, 72 W. Va. 333, 78 S. E. 1000; *Bush v. Indiana & Ohio Live Stock Ins. Co.*, 74 W. Va. 244, 81 S. E. 984.

In *Langdeau v. John Hancock Mut. Life Ins. Co.*, 194 Mass. 56, 80 N. E. 452, 18 L. R. A. (N. S.) 1190, the policy was based on a paper, the first page of which purported to be a "proposal for insurance" signed by insured, who was referred to under his signature as the "person to be insured." The second page signed by him as "the applicant," was designated as an application for insurance. The policy provided that it was executed in consideration of the statements, and the application therefor, which were as warranties made a part of the contract, etc. All the material portions designated as "the proposal" were by repetition incorporated in "the application." It was held that, though the application did not contain the name of the beneficiary, a copy thereof attached to the policy constituted a sufficient compliance with Rev. Laws, c. 118, § 73, prohibiting the admission in evidence of false representations to avoid a policy unless a copy of the application containing the same is attached to the policy delivered to the insured.

If the policy contains a provision that "all statements made by the insured shall in the absence of fraud be deemed representations and not warranties," it is proper to admit answers by the insured to the medical examiner made after her application, when such answers, in connection with the stipulated facts, show a willful misstatement of matters materially affecting the risk (*Kennedy v. Prudential Ins. Co. of America*, 177 Ill. App. 50).

In an action on a mutual benefit policy, in the application for which insured had stated that her brother died from lead poisoning, whereas in fact he died from tuberculosis, evidence that physicians had told her that he died from lead poisoning was admis-

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sible on the issue of her good faith (*Murray v. Brotherhood of American Yeomen* [Iowa] 163 N. W. 421).

1975-1978. (h) Same—Admissions and declarations

1976 (h). Evidence of what a deceased assured person said inconsistent with the answers contained in his application which is not part of the *res gestæ* is not competent against the beneficiary to prove the falsity of such answers. And generally statements made by an assured person inconsistent with the answers contained in his application, not a part of the *res gestæ*, are only provable to show knowledge on his part of the falsity of such answers when that is material and there is competent evidence warranting a finding that the answers were false (*Johnson v. Fraternal Reserve Ass'n*, 117 N. W. 1019, 136 Wis. 528).

1978. (i) Same—Weight and sufficiency

1978 (i). Where a misrepresentation or breach of warranty is relied on as a defense, it must be proved by a preponderance of evidence.

Biermann v. Guaranty Mut. Life Ins. Co., 142 Iowa, 341, 120 N. W. 963; *Logan v. Provident Sav. Life Assur. Soc. of New York*, 50 S. E. 529, 57 W. Va. 384. But it is error to charge that defendant must prove the breach of warranty in an accident policy by the preponderance of the evidence, where the breach was admitted. *Kelly v. United States Health & Accident Ins. Co.*, 65 S. E. 949, 84 S. C. 95.

The existence of misrepresentation or breach of warranty will not be assumed on doubtful evidence or circumstances of mere suspicion (*Life Ins. Co. of Virginia v. Hairston*, 62 S. E. 1057, 108 Va. 832, 128 Am. St. Rep. 989).

The sufficiency of the evidence to show misrepresentation or breach of warranty is considered in *Maloney v. North American Union*, 143 Ill. App. 615; *Metropolitan Life Ins. Co. v. Wolford*, 49 Ind. App. 392, 97 N. E. 444; *Illinois Life Ins. Co. v. De Lang*, 124 Ky. 569, 99 S. W. 616, 30 Ky. Law Rep. 753; *National Protective Legion v. Allphin*, 133 S. W. 788, 141 Ky. 777; *National Council of Knights and Ladies of Security v. Wilson*, 143 S. W. 1000, 147 Ky. 293; *Modern Woodmen of America v. Wilson*, 107 N. W. 568, 76 Neb. 344; *Lindemann v. Metropolitan Life Ins. Co.* (Sup.) 120 N. Y. Supp. 96; *Brock v. Metropolitan Life Ins. Co.*, 156 N. C. 112, 72 S. E. 213; *Silverstein v. Knights & Ladies of Security*, 129 Minn. 340, 152 N. W. 724; *Royal Neighbors of America v.*

Spore, 169 S. W. 984, 160 Ky. 572; Schmidt v. National Council of Knights and Ladies of Security, 176 Ill. App. 213; Bolton v. Inter-Ocean Life & Casualty Co., 187 Mo. App. 167, 172 S. W. 1187.

The sufficiency of the evidence to show that the representations were false and fraudulent is considered in Rakov v. Bankers' Life Ins. Co. of City of New York, 164 App. Div. 645, 150 N. Y. Supp. 55; Jacoby v. Prudential Ins. Co. of America, 94 Neb. 422, 143 N. W. 448; New York Life Ins. Co. v. Moats, 207 Fed. 481, 125 C. C. A. 143.

Sufficiency of the evidence to show fraud is considered in McCombs v. Travelers' Ins. Co. of Hartford, Conn., 159 Iowa, 435, 141 N. W. 328.

The sufficiency of the evidence to warrant the jury in finding that misrepresentations as to the cost and length of service of the automobile were not material to the risk is considered in St. Paul Fire & Marine Ins. Co. v. Huff (Tex. Civ. App.) 172 S. W. 755.

1978-1980. (j) Questions for the jury

1979 (j). Ordinarily the truth or falsity of representations, as well as their materiality and good faith, are questions for the jury.

Supreme Lodge Knights and Ladies of Honor v. Baker, 163 Ala. 518, 50 South. 958; Haughton v. Aetna Life Ins. Co., 165 Ind. 32, 73 N. E. 592, rehearing denied 165 Ind. 32, 74 N. E. 613; Collins v. Catholic Order of Foresters, 43 Ind. App. 549, 88 N. E. 87; Provident Sav. Life Assur. Soc. v. Wayne's Adm'r, 93 S. W. 1049, 29 Ky. Law Rep. 160; Supreme Lodge K. P. v. Bradley, 107 S. W. 209, 32 Ky. Law Rep. 743, judgment modified on rehearing 109 S. W. 1178; Brison v. Metropolitan Life Ins. Co. (Ky.) 115 S. W. 785; United States Casualty Co. v. Campbell, 148 Ky. 554, 146 S. W. 1121; Little v. Security Mut. Life Ins. Co., 150 Ky. 35, 149 S. W. 1112; Mutual Life Ins. Co. v. Mullan, 107 Md. 457, 69 Atl. 385; Mutual Life Ins. Co. v. Rain, 108 Md. 353, 70 Atl. 87; Aetna Life Ins. Co. of Hartford, Conn., v. Millar, 113 Md. 686, 78 Atl. 483; Standard Accident & Life Ins. Co. of Detroit, Mich., v. Wood, 116 Md. 575, 82 Atl. 702; Monjeau v. Metropolitan Life Ins. Co., 208 Mass. 1, 94 N. E. 302; Pelican v. Mutual Life Ins. Co. of New York, 44 Mont. 277, 119 Pac. 778; Marzulli v. Metropolitan Life Ins. Co., 81 N. J. Law, 166, 78 Atl. 1051; Beard v. Royal Neighbors of America, 53 Or. 102, 99 Pac. 83, 19 L. R. A. (N. S.) 798, 17 Ann. Cas. 1199; French v. Fidelity & Casualty Co. of New York, 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011; National Union v. Kelley, 140 Pac. 1157, 42 Okl. 98; Groffinger v. Metropolitan Life Ins. Co., 183 Ill. App. 618; Connecticut Mut. Life Ins. Co. v. Mulkey, 142 Ga. 358, 82 S. E. 1054; Johnson v. National Life Ins. Co., 144 N. W. 218, 123 Minn. 453, Ann. Cas. 1915A, 458; Horne v. John Hancock Mut. Life Ins. Co., 53 Pa. Super. Ct. 330; Rigby

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v. Metropolitan Life Ins. Co., 240 Pa. 332, 87 Atl. 428; Conner v. Life & Annuity Ass'n, 171 Mo. App. 364, 157 S. W. 814; Prudential Ins. Co. of America v. Sellers, 54 Ind. App. 326, 102 N. E. 894; Diehl v. Mutual Life Ins. Co. of New York, 176 Ill. App. 462; Mays v. New Amsterdam Casualty Co., 40 App. D. C. 249, 46 L. R. A. (N. S.) 1108; Continental Casualty Co. v. Owen, 38 Okl. 107, 131 Pac. 1084; New York Life Ins. Co. v. Moats, 207 Fed. 481, 125 C. C. A. 143; Columbia Life Ins. Co. v. Tousey, 153 S. W. 767, 152 Ky. 447.

But in the following cases the question of materiality was held to be one for the court: Metropolitan Life Ins. Co. v. Hayslett, 111 Va. 107, 68 S. E. 256; Kennedy v. Prudential Ins. Co. of America, 177 Ill. App. 50. And in *McEwen v. New York Life Ins. Co.*, 23 Cal. App. 694, 139 Pac. 242, it was held that, though the materiality of representations, if it depends upon inferences drawn from facts and circumstances proved, is for the jury yet, conceding that the rule that written answers to written questions are always material has been changed by Civ. Code, §§ 2565, 2573, 2581, the materiality of written representations is a question for the court, and not for the jury. *National Americans v. Ritch*, 121 Ark. 185, 180 S. W. 488; *Guararaia v. Metropolitan Life Ins. Co.* (N. J.) 101 Atl. 298; *Fitzgerald v. Metropolitan Life Ins. Co.*, 90 Vt. 291, 96 Atl. 498; *Miller v. National Casualty Co.*, 62 Pa. Super. Ct. 417; *Shawnee Life Ins. Co. v. Watkins* (Okl.) 156 Pac. 181; *American Temperance Life Ins. Ass'n of City of New York v. Solomon*, 233 Fed. 213, 147 C. C. A. 219; *Warren v. New York Life Ins. Co.* (Mo. App.) 182 S. W. 96.

But, if either of these facts is shown by clear and uncontroverted evidence, the court may so rule as a matter of law.

Brisou v. Metropolitan Life Ins. Co. (Ky.) 115 S. W. 785; *Mutual Life Ins. Co. v. Mullan*, 107 Md. 457, 69 Atl. 385; *Mutual Life Ins. Co. v. Rain*, 108 Md. 353, 70 Atl. 87; *Ætna Life Ins. Co. of Hartford, Conn., v. Millar*, 113 Md. 686, 78 Atl. 483; *Beard v. Royal Neighbors of America*, 53 Or. 102, 99 Pac. 83, 19 L. R. A. (N. S.) 798, 17 Ann. Cas. 1199; *Hews v. Equitable Life Assur. Soc. of United States*, 143 Fed. 850, 74 C. C. A. 676; *Conner v. Life & Annuity Ass'n*, 157 S. W. 814, 171 Mo. App. 364; *Empire Life Ins. Co. v. Jones*, 82 S. E. 62, 14 Ga. App. 647; *Rigby v. Metropolitan Life Ins. Co.*, 87 Atl. 428, 240 Pa. 332; *Metropolitan Life Ins. Co. v. Jennings* (Md.) 101 Atl. 608.

If the only defense is fraud in the procurement of the insurance, and there is no evidence to establish it, it is proper to direct a verdict for plaintiff (*Eminent Household of Columbian Woodmen v. Prater*, 133 Pac. 48, 37 Okl. 568).

1980 (j). The materiality of a representation in insurance is sometimes a question of law, where the statement is made in response to a direct inquiry, or where by the contract the parties have settled the materiality by agreement (*Spence v. Central Acc. Ins. Co.*, 86 N. E. 104, 236 Ill. 444, 19 L. R. A. [N. S.] 88).

Where questions in an application for insurance are so framed that the insured may have honestly mistaken their true import and have given answers which are in fact untrue, but true as he may have reasonably understood the question, it is for the jury to determine whether he made his answers honestly and in good faith (*Modern Woodmen of America v. Wilson*, 107 N. W. 568, 76 Neb. 344). So, too, where an accident policy contained a schedule of warranties consisting of separate statements followed by a blank line, in which a V-shaped check mark was placed, it was held that there was an ambiguity with respect to the conclusion to be drawn from the warranties; and it was for the jury to determine whether the check marks were to be treated as a denial of any exception or as a waiver of the statement in any answer thereto (*French v. Fidelity & Casualty Co. of New York*, 135 Wis. 259, 115 N. W. 869, 17 L. R. A. [N. S.] 1011).

In *Mutual Life Ins. Co. v. Dibrell*, 137 Tenn. 528, 194 S. W. 581, L. R. A. 1917E, 554, it was held that whether a misrepresentation of insured in applying for a life insurance policy increased the risk of loss is a question of law either under Shannon's Code, § 3306, or at common law.

1980-1981. (k) Instructions

1980 (k). Where the policies contained the only contract between the parties, and contained no reference to the health of insured, or the fact that she had other insurance, or had been rejected by other companies, requested charges that if insured when she made application had heart or kidney disease, or dropsy, and fraudulently concealed the fact from the insurer or its agents, falsely represented that she had not been rejected by any insurance company, or had made false answer as to the amount of insurance she carried, and but for such concealment and false answers the policies would not have been issued, defendant should recover, were properly refused (*Southern States Mut. Life Ins. Co. v. Herlihy*, 138 Ky. 359, 128 S. W. 91). Where the action was defended on the ground of misrepresentations in the application, it was im-

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proper to allow the jury to determine according to their own standards what insurer would reasonably have done, if insured's answers in the application had been truthfully made, if the jury found they were not so made. The court should instruct that if any of the answers were substantially untrue, and according to the usual course of the insurance business, the policy would not have been issued had the truth been stated, they should find for the insurer, and in another instruction state that the jury should not determine whether insurer's physicians were mistaken as to his ailment, or whether he at the time of his application in good faith believed he was healthy, but that they should determine whether the answers were substantially true, and, if untrue, whether according to the usual course of business the policy would have been issued if the truth had been stated (Supreme Lodge K. P. v. Bradley, 107 S. W. 209, 32 Ky. Law Rep. 743, judgment modified on rehearing 109 S. W. 1178).

The propriety of instructions on the issue of false representations is considered in *Pacific Mut. Life Ins. Co. v. Despain*, 77 Kan. 654, 95 Pac. 580; *National Protective Legion v. Allphin*, 133 S. W. 788, 141 Ky. 777; *Life Ins. Co. of Virginia v. Hairston*, 62 S. E. 1057, 108 Va. 832, 128 Am. St. Rep. 989.

1981-1983. (1) Trial, judgment and review

1982 (1). A general verdict for the plaintiff is not controlled by answers to special interrogatories showing merely a breach of warranty by insured as to prior medical advice (*Catholic Order of Foresters v. Collins*, 51 Ind. App. 285, 99 N. E. 745).

4. STATUTORY PROVISIONS RELATING TO AVOIDANCE OF POLICY FOR MISREPRESENTATION OR BREACH OF WARRANTY

1983-1985. (a) Statutory provisions qualifying strict rule

1984 (a). The statute adopted in many states, providing in substance that false answers in an application for insurance shall not render the policy void, unless it be as to facts material to the risk or made in bad faith, are remedial in their nature, and should be liberally construed to avoid a forfeiture of the policy.

Metropolitan Life Ins. Co. v. Goodman, 65 South. 449, 10 Ala. App. 446; *Mutual Life Ins. Co. of New York v. Mullan*, 107 Md. 457, 69 Atl. 385; *Soules v. Brotherhood of American Yeomen*, 19

N. D. 23, 120 N. W. 760; *Collins v. Casualty Co. of America*, 112 N. E. 634, 224 Mass. 327, L. R. A. 1916E, 1208; *Duff v. Prudential Ins. Co. of America* (N. J.) 101 Atl. 371; *Pacific Mut. Life Ins. Co. v. Barnes*, 35 Ohio Cir. Ct. R. 380; *Moore v. Prudential Casualty Co.*, 156 N. Y. Supp. 892, 170 App. Div. 849; *Donahue v. Mutual Life Ins. Co. of New York* (N. D.) 164 N. W. 50; *Guarantee Life Ins. Co. v. Evert* (Tex. Civ. App.) 178 S. W. 643; *Metropolitan Life Ins. Co. v. Goodman*, 71 South. 409, 196 Ala. 304; *Archer v. Equitable Life Assur. Society of United States*, 154 N. Y. Supp. 519, 169 App. Div. 43; *Arnold v. New York Life Ins. Co.*, 177 S. W. 78, 131 Tenn. 720; *Archer v. Equitable Life Assur. Soc. of United States*, 112 N. E. 433, 218 N. Y. 18, affirming 154 N. Y. Supp. 519, 169 App. Div. 43.

Such statutes do not, of course, apply to policies existing at the time of their enactment.

Leonard v. State Mut. Life Assur. Co., 61 Atl. 52, 27 R. I. 121, 114 Am. St. Rep. 30, granting reargument of 24 R. I. 7, 51 Atl. 1049, 96 Am. St. Rep. 698; *Supreme Ruling of Fraternal Mystic Circle v. Hansen* (Tex. Civ. App.) 161 S. W. 54; *McKnelly v. Brotherhood of American Yeomen*, 160 Wis. 514, 152 N. W. 169; *McAlpine v. Fidelity & Casualty Co. of New York*, 158 N. W. 967, 134 Minn. 192.

One who procures issuance of policy by intentional fraud cannot invoke benefits of statute.

Quinn v. Mutual Life Ins. Co. of New York, 158 Pac. 82, 91 Wash. 543; *St. Paul Fire & Marine Ins. Co. v. Garnier* (Tex. Civ. App.) 196 S. W. 980.

The Massachusetts statute (St. 1907, p. 854, c. 576, § 21) provides that "no * * * warranty made in the negotiation of a contract or policy of insurance by the assured * * * shall be deemed material or defeat or avoid the policy * * * unless made with actual intent to deceive or unless the matter * * * made a warranty increased the risk of loss." It was held in *Everson v. General Accident Fire & Life Assur. Corp., Limited*, of Perth, Scotland, 202 Mass. 169, 88 N. E. 658, that the word "negotiation," as used therein, meant the entire transaction of applying for and finally issuing the completed contract, and comprehended all warranties, whether made in the policy itself or separate or subordinate or inducing instruments or agreements, and hence statements in a "schedule of warranties" in an accident policy material to the acceptance of the risk, and for what amount and rate, were made in the "negotiation" of the contract, within the meaning of the statute.

The Missouri statute (Rev. St. 1909, § 6937) provides in effect

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that no misrepresentation made in obtaining life insurance shall be deemed material or render the policy void, "unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable." Such statute has no application to a suit to avoid the policy during the life of assured (*Pacific Mut. Life Ins. Co. of California v. Glaser*, 150 S. W. 549, 245 Mo. 377, 45 L. R. A. [N. S.] 222). In *Kribs v. United Order of Foresters*, 177 S. W. 766, 191 Mo. App. 524, it was held that the statute declaring that statements by applicant for life insurance shall be regarded as representations, relates alone to insurance on the stipulated premium plan. It has been held in Kentucky that the statute does not apply where insured made no application for or statements to obtain the policy (*Independent Life Ins. Co. of America v. Rider*, 150 S. W. 649, 150 Ky. 505, 42 L. R. A. [N. S.] 560).

Where a stipulation in a Massachusetts life policy that it was incontestable except for nonpayment of premiums was void, Rev. Laws, c. 118, § 21, providing that misrepresentations by insured do not avoid the policy, unless such representation was made with actual intent to deceive, or unless the matter misrepresented increased the risk, was applicable. *Reagan v. Union Mut. Life Ins. Co.*, 92 N. E. 1025, 207 Mass. 79.

Under Civ. Code Cal. §§ 2607, 2612, it has been held that, where answers in application for health and accident policy were false, insured could not recover; application being made a part of policy (*Porter v. General Acc. Fire & Life Assur. Corp.*, 157 Pac. 825, 30 Cal. App. 198).

1985-1987. (b) Constitutionality and validity of statutes

1985 (b). In *Continental Casualty Co. v. Owen*, 38 Okl. 107, 131 Pac. 1084, it was held that the Oklahoma statute (Comp. Laws 1909, § 3784), providing that statements in an application shall be deemed representations and not warranties, is within the police power of the state.

1987-1988. (c) Application of statute to warranties

1987 (c). These statutes, whether they speak of statements as warranties or not, have been held to include warranties.

Empire Life Ins. Co. v. Gee, 171 Ala. 435, 55 South. 166; *Ætna Life Ins. Co. of Hartford, Conn., v. Millar*, 113 Md. 686, 78 Atl. 483; *Barker v. Metropolitan Life Ins. Co.*, 198 Mass. 375, 84 N. E. 490; *Johnson v. National Life Ins. Co.*, 144 N. W. 218, 123 Minn.

453, Ann. Cas. 1915A, 458; *Lynch v. Prudential Ins. Co. of America*, 150 Mo. App. 461, 131 S. W. 145; *Dodt v. Prudential Ins. Co. of America*, 186 Mo. App. 168, 171 S. W. 655; *Soules v. Brotherhood of American Yeomen*, 19 N. D. 23, 120 N. W. 760. In *Kidder v. Supreme Commandery United Order of Golden Cross*, 192 Mass. 326, 78 N. E. 469, it was said that statutes of this character are declaratory of the common law as to misrepresentations, and only operate to change the common law with respect to warranties.

1988-1989. (d) Operation of statute as affected by intent of applicant

1988 (d). It is generally held that under the provisions of these statutes a misrepresentation or breach of warranty, unless material or increasing the risk will not avoid the policy, unless it be made with actual intent to deceive.

Empire Life Ins. Co. v. Gee, 171 Ala. 435, 55 South. 166; *Mutual Life Ins. Co. of New York v. Allen*, 174 Ala. 511, 56 South. 568; *United States Health & Accident Ins. Co. v. Bennett's Adm'r* (Ky.) 105 S. W. 433; *Kidder v. Supreme Commandery United Order of Golden Cross*, 192 Mass. 326, 78 N. E. 469; *Langdeau v. John Hancock Mut. Life Ins. Co.*, 194 Mass. 56, 80 N. E. 452, 18 L. R. A. (N. S.) 1190; *Continental Casualty Co. v. Owen*, 38 Okl. 107, 131 Pac. 1084; *Life Ins. Co. of Virginia v. Hairston*, 62 S. E. 1057, 108 Va. 832, 128 Am. St. Rep. 969; *Modern Woodmen of America v. Lawson*, 110 Va. 81, 65 S. E. 509, 135 Am. St. Rep. 927; *Kelper v. Equitable Life Assur. Soc. of United States* (C. C.) 159 Fed. 206; *Keatley v. Grand Fraternity* (D. C.) 198 Fed. 272; *Brigham v. Mutual Life Ins. Co. of New York*, 163 Pac. 380, 95 Wash. 196; *Massachusetts Mut. Life Ins. Co. v. Crenshaw*, 70 South. 768, 195 Ala. 263.

It has been held in *Wheelock v. Home Life Ins. Co.*, 115 Minn. 177, 131 N. W. 1081, that in the provision in a life policy, required by Laws 1907, c. 220 (Rev. Laws Supp. 1909, §§ 1695—2 to 1695—12), that all statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties, and no such statement shall avoid the policy unless contained in a written application, and unless a copy of such application be indorsed on or attached to the policy, the words "such statement" do not mean statements made in the absence of fraud, but do mean statements made relating to the applicant's history, habits, or health, of the character usually made and signed by an applicant for insurance, whether they are made in the absence of fraud or not. In *Knights of Modern Maccabees v. Gillespie*, 71 South. 67, 14 Ala. App. 493, it was held, under Code 1907, § 4572, that where a question in an applica-

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tion for insurance was not answered, although it was done with intent to deceive, if it did not in fact deceive, there was no ground for avoiding the policy.

1989-1990. (e) Same—Missouri statute

1989 (e). In *Lynch v. Prudential Ins. Co. of America*, 150 Mo. App. 461, 131 S. W. 145, it was held that, though before the death of insured willful fraud in obtaining life insurance might be ground for canceling the policy, yet after his death it will, under Rev. St. 1899, § 7890 (Ann. St. 1906, p. 3746), like any other misrepresentation, be available as a defense to an action on the policy, only if it was about a matter which actually contributed to his death.

1990-1992. (g) Operation of statute as affected by materiality of statement

1990 (g). In view of the rule as to intent, it is obvious that the materiality of the statement alleged to be false is a determining factor under the statutes.

Empire Life Ins. Co. v. Gee, 171 Ala. 435, 55 South. 166; *Keatley v. Grand Fraternity*, 2 Boyce (Del.) 267, 78 Atl. 874; *Provident Sav. Life Assur. Soc. v. Dees*, 120 Ky. 285, 86 S. W. 522, 27 Ky. Law Rep. 670; *Grand Fraternity v. Keatley*, 4 Boyce (Del.) 308, 88 Atl. 553, reversing 2 Boyce (Del.) 511, 82 Atl. 294; *United States Health & Accident Ins. Co. v. Bennett's Adm'r*, 105 S. W. 433, 32 Ky. Law Rep. 235; *Ætna Life Ins. Co. v. Claypool*, 128 Ky. 43, 107 S. W. 325; *United States Casualty Co. v. Campbell*, 146 S. W. 1121, 148 Ky. 554; *Masonic Life Ass'n of Western New York v. Robinson*, 149 Ky. 80, 147 S. W. 882, 41 L. R. A. (N. S.) 505; *Hartmann v. National Council of Knights and Ladies of Security*, 190 Mo. App. 92, 175 S. W. 212; *Alexander v. Metropolitan Life Ins. Co.*, 150 N. C. 536, 64 S. E. 432; *Satterlee v. Modern Brotherhood of America*, 106 N. W. 561, 15 N. D. 92; *United Benev. Ass'n v. Baker* (Tex. Civ. App.) 141 S. W. 541; *Modern Woodmen of America v. Lawson*, 110 Va. 81, 65 S. E. 509, 135 Am. St. Rep. 927; *Continental Casualty Co. v. Lindsay*, 111 Va. 389, 69 S. E. 344; *Ætna Life Ins. Co. v. Moore*, 34 Sup. Ct. 186, 231 U. S. 543, 58 L. Ed. 356 (construing the Georgia statute); *Prudential Ins. Co. of America v. Moore*, 34 Sup. Ct. 191, 231 U. S. 560, 58 L. Ed. 367 (construing the Georgia statute); *Kelper v. Equitable Life Assur. Soc. of United States* (C. C.) 159 Fed. 206, 165 Fed. 595, 91 C. C. A. 433; *Keatley v. Grand Fraternity* (D. C.) 198 Fed. 272.

Whether a misrepresentation in an application for insurance was material to the risk within Act Pa. June 23, 1885 (P. L. 134), depends on whether, but for the misrepresentation, insurer would not have entered into the contract. *Miller v. Maryland Casualty*

Co., 193 Fed. 343, 113 C. C. A. 267; *Eminent Household Columbian Woodmen v. Gallant*, 69 South. 884, 194 Ala. 680.

In *Paulhamus v. Security Life & Annuity Co.* (C. C.) 163 Fed. 554, it was said that under the Pennsylvania statute (Act June 23, 1885, § 1, P. L. 134), providing that, when an application for life insurance warrants the truth of the answers therein contained, no misstatements made in good faith shall effect a forfeiture, unless the misrepresentation be material to the risk, a material misstatement will avoid the policy, regardless of the ignorance or good faith of the warrantor. And in North Dakota it has been held (*Van Woert v. Modern Woodmen*, 29 N. D. 441, 151 N. W. 224) that the statute of that state (Comp. Laws 1913, § 6501) does not change the effect of a false warranty in a contract of benefit insurance as to a fact material to the risk assumed.

1991 (g). In some states it is held that the misrepresentation must relate to matters increasing the risk of loss.

Reference may be made to *Empire Life Ins. Co. v. Gee*, 171 Ala. 435, 55 South. 166; *Mutual Life Ins. Co. of New York v. Allen*, 174 Ala. 511, 56 South. 568; *Kidder v. Supreme Commandery United Order of Golden Cross*, 78 N. E. 469, 192 Mass. 326; *Johnson v. National Life Ins. Co.*, 123 Minn. 453, 144 N. W. 218, Ann. Cas. 1915A, 458.

Under the Kentucky statute (Ky. St. § 639 [Russell's St. § 4286]), providing that all statements or descriptions in any application for a policy of insurance shall be representations, and not warranties, and that no misrepresentation shall prevent a recovery, unless material or fraudulent, it has been held that, while misrepresentations in an application for life policy in order to defeat a recovery must be both material and untrue, yet, if material and untrue, they will defeat a recovery without reference to the good faith or honest intention of the applicant, unless the question answered relates to a matter concerning which his knowledge in the ordinary course of things could not amount to more than information and belief (*Blenke v. Citizens' Life Ins. Co.*, 140 S. W. 561, 145 Ky. 332). Under the Minnesota statute (Rev. Laws 1905, § 1623), a material misrepresentation made with intent to deceive will avoid a policy though in the standard form prescribed by Laws 1907, c. 220 (Gen. St. 1913, §§ 3470-3483); but, if the representation is not made with intent to deceive, the policy will not be avoided unless the matter misrepresented increases the risk of loss (*Johnson v. National Life Ins. Co.*, 123 Minn. 453, 144 N. W. 218, Ann. Cas. 1915A, 458).

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In a few states it has been held that the misrepresentation must refer to matters contributing to the loss, within the statute of those states.

Keller v. Home Life Ins. Co., 198 Mo. 440, 95 S. W. 903; **Lynch v. Prudential Ins. Co. of America**, 150 Mo. App. 461, 131 S. W. 145; **Frazier v. Metropolitan Life Ins. Co.**, 161 Mo. App. 709, 141 S. W. 936; **Benson v. Metropolitan Life Ins. Co.**, 161 Mo. App. 480, 144 S. W. 122; **Welsh v. Metropolitan Life Ins. Co. of New York**, 165 Mo. App. 233, 147 S. W. 147. See, also, **Royal Union Mut. Life Ins. Co. v. Wynn (C. C.)** 177 Fed. 289 (construing the Georgia statute). But see **Fishplate v. Fidelity & Casualty Co. of New York**, 140 N. C. 589, 53 S. E. 354, where it was held that a representation is material if it would naturally affect the judgment of the insurer in accepting the risk, though it did not contribute to the loss. And to the same effect is **Bryant v. Metropolitan Life Ins. Co.**, 147 N. C. 181, 60 S. E. 983.

Under the Missouri statute, there is no distinction between a mere misrepresentation and a fraudulent misrepresentation; the statute applying to both equally (**Conner v. Life & Annuity Ass'n**, 157 S. W. 814, 171 Mo. App. 364).

1992-1994. (h) Validity of stipulations intended to evade the operation of statutes

1992 (h). In **Continental Casualty Co. v. Owen**, 38 Okl. 107, 131 Pac. 1084, it was held that the requirement of Comp. Laws 1909, § 3784, that statements in the insured's application must be construed as representations and not warranties cannot be evaded by indorsing such statements upon the policy, which also contains a provision stating that it is issued in consideration of such statements, each of which the insured warrants to be complete and true. And in other jurisdictions it has been held that the provisions of the statutes cannot be evaded by express stipulations that the statements of the applicant shall be regarded as warranties.

Reference may be made to **Provident Sav. Life Assur. Soc. v. Wayne's Adm'r**, 93 S. W. 1049, 29 Ky. Law Rep. 160; **Keller v. Home Life Ins. Co.**, 95 S. W. 903, 198 Mo. 440.

1994-1996. (i) What law governs

1994 (i). A life policy, issued in Massachusetts by a Massachusetts company and to be executed there, is a Massachusetts contract, and is governed by the Massachusetts statute (**Leonard v. State Mut. Life Assur. Co.**, 27 R. I. 121, 61 Atl. 52, 114 Am. St. Rep. 30). So, too, it has been held that an accident policy, deliv-

ered and countersigned in Pennsylvania was a Pennsylvania contract within Act Pa. June 23, 1885 (P. L. 134), making untrue statements immaterial, unless material to the risk (*Miller v. Maryland Casualty Co.*, 193 Fed. 343, 113 C. C. A. 267). And, conversely, if there is no statute limiting the effect of misrepresentations in the state furnishing the proper law of the contract, the common law as to the effect of representations and warranties will be applied (*Reagan v. Union Mut. Life Ins. Co.*, 207 Mass. 79, 92 N. E. 1025).

1996-1998. (j) To what companies the statute applies

1997 (j). In *Miller v. Maryland Casualty Co.*, 113 C. C. A. 267, 193 Fed. 343, it was held that the Pennsylvania statute applies to accident policies; and in *Keatley v. Grand Fraternity (D. C.)* 198 Fed. 264, the statute was held to apply to fraternal associations organized under the law of Pennsylvania. So, too, it has been held in Alabama (*National Union v. Sherry*, 180 Ala. 627, 61 South. 944) that the Alabama statute applies to benefit certificates; at least to such certificates as were issued prior to the passage of the Act of April 24, 1911 (Laws 1911, p. 700). On the other hand, in Iowa (*Sargent v. Modern Brotherhood of America*, 148 Iowa, 600, 127 N. W. 52) and South Carolina (*Robertson v. Fraternal Union*, 85 S. C. 221, 67 S. E. 247) it has been held that certificates of fraternal benefit associations are not within the operation of the statutes. The Texas statute is held to apply to assessment companies whether foreign or domestic (*National Life Ass'n v. Hogelstein* [Tex. Civ. App.] 156 S. W. 353), but does not apply to the contracts of fraternal benefit societies (*Modern Order of Prætorians v. Hollmig* [Tex. Civ. App.] 105 S. W. 846 reversing 103 S. W. 474; *Modern Woodmen of America v. Owens*, 60 Tex. Civ. App. 398, 130 S. W. 858). The Wisconsin statute does not apply to mutual benefit insurance (*Peterson v. Independent Order of Foresters*, 156 N. W. 951, 162 Wis. 562).

Contracts of mutual benefit associations are not governed by the Missouri statute touching warranties and representations.

Evans v. Modern Woodmen of America, 147 Mo. App. 155, 129 S. W. 485; *Francis v. Supreme Lodge A. O. U. W.*, 150 Mo. App. 347, 130 S. W. 500; *Krlbs v. United Order of Foresters*, 177 S. W. 766, 191 Mo. App. 524.

In determining whether a foreign insurance organization is a fraternal benefit society, the statutes of the state of the domicile of the association govern (*Herzberg v. Modern Brotherhood of Amer-*

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ica, 110 Mo. App. 328, 85 S. W. 986). And in the same case it was held that if the organization was not a fraternal beneficiary association, as defined by Rev. St. 1899, § 1408, it was immaterial that it called itself a beneficiary and fraternal society, and that the superintendent of insurance of Missouri issued to it the statutory license to do business as such. And, moreover, if the foreign organization was authorized to issue insurance to the legal representatives of the insured, it was an insurance company subject to the provisions of the statute relating to misrepresentations, and not a fraternal beneficiary society, authorized to issue certificates only for the benefit of "families, heirs, blood relatives, affianced husband or affianced wife, or to persons dependent upon the member." So, too, in *Wilson v. General Assembly of American Benev. Ass'n*, 125 Mo. App. 597, 103 S. W. 109, it was held that a certificate which names as beneficiary the legal representatives of the insured does not come within the statute.

Where a policy provided that the price of the insurance was calculated on the American Tables of Mortality, and that out of the premiums collected after the first two years a certain sum should be laid aside to make the emergency fund required by Rev. St. 1899, § 7905, and that, if conditions should come about so that the death rate should be in excess of that estimated in the American Tables, an assessment might be made to meet such emergency, it was a life insurance policy, and not an assessment policy, defined by section 7901 as one where the amount is dependent on the collection of an assessment on persons holding similar contracts, and was therefore within section 7890, declaring that no misrepresentation should avoid a policy unless the matter represented should have actually contributed to the contingency or event on which the policy was to become payable (*Williams v. St. Louis Life Ins. Co.*, 87 S. W. 499, 189 Mo. 70, reversing 97 Mo. App. 449, 71 S. W. 376).

In the absence of proof that the organization is a benefit association, it will be presumed to be subject to the provisions of the statute. *Thompson v. Royal Neighbors of America*, 154 Mo. App. 109, 133 S. W. 146.

1999-2000. (1) Questions of practice—Pleading and evidence

1999 (1). "An actual intent to deceive," within Code Ala. 1907, § 4572, providing that no representations shall avoid a life policy unless made "with actual intent to deceive," was not sufficiently averred by merely alleging the making of the statement with a

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knowledge of its falsity (*Massachusetts Mut. Life Ins. Co. v. Crenshaw*, 186 Ala. 460, 65 South. 65).

2000 (l). Under the statutes limiting the effect of misrepresentations, the burden of proving the materiality of the statements or the intent of the applicant to deceive is on the insurer.

Mutual Life Ins. Co. of New York v. Mullan, 107 Md. 457, 69 Atl. 385; *Barker v. Metropolitan Life Ins. Co.*, 84 N. E. 490, 198 Mass. 375; *Continental Casualty Co. v. Owen*, 38 Okl. 107, 131 Pac. 1084; *Owen v. United States Surety Co.*, 38 Okl. 123, 131 Pac. 1091.

2000-2001. (m) Same—Questions for jury

2000 (m). Whether a misrepresentation is material, or made with intent to deceive, within the statutes, is a question for the jury.

Monahan v. Mutual Life Ins. Co. of Baltimore, 63 Atl. 211, 103 Md. 145, 5 L. R. A. (N. S.) 759; *Coughlin v. Metropolitan Life Ins. Co.*, 189 Mass. 538, 76 N. E. 192; *Barker v. Metropolitan Life Ins. Co.*, 198 Mass. 375, 84 N. E. 490. But see Supreme Ruling of *Fraternal Mystic Circle v. Hansen* (Tex. Civ. App.) 153 S. W. 351, construing Rev. Civ. St. Tex. 1911, art. 4834.

5. EFFECT OF MISREPRESENTATION OR BREACH OF WARRANTY AS DEPENDENT ON TIME AND CIRCUMSTANCES

2001-2002. (a) Statements true when made, but false as to past time

2001 (a). It is a general rule that statements in an application usually refer only to the time when they are made. So in *Maloney v. North American Union*, 143 Ill. App. 615, a statement, "I have no injury or disease which will tend to shorten life," was held not to be a warranty against past injuries.

2002 (a). On the other hand, a statement in an application that the applicant had never had heart disease was a material representation, which, if false, would avoid the policy, though the applicant did not have heart disease at the time of making the application (*Metropolitan Life Ins. Co. v. Moravec*, 73 N. E. 415, 214 Ill. 186, reversing [1904] 116 Ill. App. 271).

2002-2003. (b) Statements true when made, but untrue when policy takes effect

2002 (b). Representations made by an applicant for life insurance as to his good health are not continuing representations, covering the period between the date of the application and the delivery of the policy, if the policy does not provide that the insured shall be in good health at the date of delivery (*New York Life Ins.*

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Co. v. Moats, 207 Fed. 481, 125 C. C. A. 143). Substantially the same position has been taken in cases of renewal policies.

Fidelity & Casualty Co. v. Meyer, 152 S. W. 995, 106 Ark. 91, 44 L. R. A. (N. S.) 493; Ætna Life Ins. Co. v. Rustin, 153 S. W. 14, 152 Ky. 42, denying rehearing 151 S. W. 366, 151 Ky. 103.

However, it has been held in other cases that any change in the physical condition of the applicant between the time of the application and the delivery of the policy should be disclosed.

Metropolitan Life Ins. Co. v. Willis, 37 Ind. App. 48, 76 N. E. 560; Harris v. Security Mut. Life Ins. Co., 130 Tenn. 325, 170 S. W. 474, L. R. A. 1915C, 153, Ann. Cas. 1916B, 380; Modern Woodmen of America v. Owens, 60 Tex. Civ. App. 398, 130 S. W. 858; Massachusetts Mut. Life Ins. Co. v. Crenshaw, 65 South. 65, 186 Ala. 460.

Where a medical examiner instead of repeating the questions contained in the application, inserted a statement that the applicant asserted that the statements made in a prior examination for insurance in another company still held good and were valid in regard to the pending examination, this should be construed as intended to reiterate the truth of the answers given on the prior examination (Fletcher v. Bankers' Life Ins. Co. of City of New York, 119 N. Y. Supp. 801, 135 App. Div. 295, reversing 62 Misc. Rep. 546, 116 N. Y. Supp. 1105).

2003 (b). Where the policy contains a condition that it shall not be binding unless at its delivery insured was in sound health, such condition applies only to unsoundness of health arising after the application and examination, and is no defense unless the disease developed between the application and the time when the policy was delivered (Modern Woodmen of America v. Atkinson, 155 S. W. 1135, 153 Ky. 527). In Gallop v. Royal Neighbors of America, 167 Mo. App. 85, 150 S. W. 1118, the policy was on the life of a married woman. In her application she agreed that the contract should not take effect until after delivery of the certificate, and not then if she then were pregnant, she became pregnant between the application and delivery of the policy, and it was held that there was no contract, though she was ignorant of her state at the time of delivery.

2005-2006. (e) Application for reissue or reinstatement, construed in connection with original application

2006 (e). Where a mutual benefit association required an additional health certificate as a condition precedent to the execution of

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a certificate of insurance for an increased amount, it was entitled to rely on false answers in such additional certificate as well as in the original application to defeat a recovery on the certificate (*Knights of Maccabees of the World v. Shields*, 160 S. W. 1043, 156 Ky. 270, 49 L. R. A. [N. S.] 853, rehearing denied 162 S. W. 778, 157 Ky. 35, 49 L. R. A. [N. S.] 860). While it is true that any contract relating to insurance is not binding on insured unless expressed in the policy, misrepresentations by insured in his application for a renewal, or his reinstatement, are binding on him, though not expressed in the policy as renewed, if made with intent to deceive, or the risk is thereby increased (*Mutual Life Ins. Co. of New York v. Allen*, 166 Ala. 159, 51 South. 877).

In *Supreme Lodge Knights of Pythias v. Davis*, 90 Ark. 264, 119 S. W. 257, the facts were these: The insured stated in his application, which was made a part of the policy and warranted to be true, that he used intoxicants only moderately. He afterwards surrendered the certificate and had a second certificate issued, and thereafter applied for a third certificate; his application stating that the warranties binding on insured under the surrendered certificates, except as modified by the present application or by-laws, were to be considered as repeated. The warranties as to intoxicants were true when first made, but when the third application was made insured drank to excess. It was held that the statements in the application should be construed as referring to the present, unless they expressly or impliedly referred to the future, and the statement in the first application as to the use of intoxicants did not refer to the future, so that the blanket confirmation in the third application of the warranties first made was not a warranty that insured did not then use intoxicants to excess.

6. CONCEALMENT AND ITS EFFECT ON THE POLICY

2007-2008. (a) Duty to make disclosure in general

2007 (a). It is the duty of the applicant for life insurance to disclose all facts material to the risk and a failure to make full disclosure avoids the policy.

Keatley v. Grand Fraternity, 2 Boyce (Del.) 511, 82 Atl. 294; *Ætna Life Ins. Co. v. Conway*, 75 S. E. 915, 11 Ga. App. 557; *Goldstein v. New York Life Ins. Co.*, 176 App. Div. 813, 162 N. Y. Supp. 1088.

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2008-2009. (b) Duty to disclose change in condition

2008 (b). It is apparently the settled rule that, if any change takes place in the physical condition of the applicant between the time the application was made and the delivery of the policy, it should be disclosed.

Metropolitan Life Ins. Co. v. Willis, 76 N. E. 560, 37 Ind. App. 48;
Harris v. Security Mut. Life Ins. Co., 170 S. W. 474, 130 Tenn.
825, L. R. A. 1915C, 153, Ann. Cas. 1916B, 380; *Modern Wood-*
men of America v. Owens, 60 Tex. Civ. App. 398, 130 S. W. 858.

The duty, however, to disclose a material change for the worse in his health after the making of the application and medical examination and before the issuance of the policy implies knowledge on the applicant's part of such change (*Fitzgerald v. Metropolitan Life Ins. Co.*, 98 Atl. 498, 90 Vt. 291).

2009-2010. (d) Specific inquiries—Necessity of full disclosure

2009 (d). Where a fact is specifically inquired about in an application for insurance, the applicant is required to make a substantial disclosure thereof (*Gardner v. North State Mut. Life Ins. Co.*, 79 S. E. 806, 163 N. C. 367, 48 L. R. A. [N. S.] 714, Ann. Cas. 1915B, 652).

2011-2012. (f) Failure to make inquiry

2012 (f). In view of the rule that a policy is not necessarily avoided by a failure to disclose if no inquiry is made, it has been held that the fact that insured was not a fit subject for insurance when a policy was issued to him does not release insurer from liability, if insured acted in good faith; he not being bound to warn insurer against the undertaking.

Roe v. National Life Ins. Ass'n, 115 N. W. 500, 137 Iowa, 696, 17 L.
R. A. (N. S.) 1144; *Helmbold v. Independent Order of Puritans*,
61 Pa. Super. Ct. 164.

2014. (h) Effect of concealment as dependent on materiality of facts

2014 (h). Concealment by insured of a fact material to the risk is equivalent to a false representation that the fact does not exist (*Pelican v. Mutual Life Ins. Co. of New York*, 44 Mont. 277, 119 Pac. 778).

2014-2015. (i) Effect of concealment as dependent on intent of applicant

2015 (i). While failure to state a material fact will not avoid a policy, unless such failure be fraudulent, the willful concealment of
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a material fact which would enhance the risk will invalidate the policy.

Ætna Life Ins. Co. v. Conway, 75 S. E. 915, 11 Ga. App. 557; *Empire Life Ins. Co. v. Jones*, 14 Ga. App. 647, 82 S. E. 62.

2016-2018. (k) Pleading and practice

2017 (k). Where an insurance company seeks to avoid the payment of a policy of life insurance by reason of the fraudulent concealment of the changed condition of the health of the insured after the making of the application, such defense, to be made available, must be pleaded, and such fraudulent concealment properly alleged in its answer (*Columbus Mut. Life Ins. Co. v. Ford*, 2 Ohio App. 410, 34 Ohio Cir. Ct. R. 479, appeal dismissed 106 N. E. 1052, 88 Ohio St. 597, 107 N. E. 510, 90 Ohio St. 238).

On sufficiency of evidence, see *United States Annuity & Life Ins. Co. v. Peak* (Ark.) 195 S. W. 392.

7. PERSONS AFFECTED BY MISREPRESENTATION OR BREACH OF WARRANTY

2018-2019. (a) Beneficiaries in general

2018 (a). Effect of false statements amounting to fraud that avoids contract of life insurance is not dependent on fact they were made by person suing on policy, or that they were made without his knowledge (*Pacific Mut. Life Ins. Co. v. Hayes* [Ala.] 76 South. 12).

2022-2023. (f) False statements by beneficiary or third person

2023 (f). Answers or alleged answers written into an application by an agent deputed to secure members, inserted long after the signature of the applicant, do not constitute warranties (*Maloney v. North American Union*, 143 Ill. App. 615).

8. EFFECT OF MISREPRESENTATION OR BREACH OF WARRANTY AS TO AGE OF INSURED

2023-2024. (a) Effect of false statements in general

2023 (a). False statements as to his age made by an applicant for life insurance, will avoid the policy unless waived by the company.

Logia Suprema de La Alianza Hispano-Americana v. Aguirre, 14 Ariz. 390, 129 Pac. 503; *Criscuolo v. Societa Monarchica Di Mutuo*

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Soccorso Vittorio Emanuele III, 89 Conn. 249, 93 Atl. 532; **Marcus v. National Council of Knights and Ladies of Security**, 123 Minn. 145, 143 N. W. 265; **Waltz v. Workmen's Sick and Death Benefit Fund of the United States of America**, 139 N. Y. Supp. 1016, 78 Misc. Rep. 499, judgment reversed (Sup.) 141 N. Y. Supp. 578; **Hartmann v. National Council of Knights and Ladies of Security**, 190 Mo. App. 92, 175 S. W. 212; **Taylor v. Grand Lodge A. O. U. W. of Minnesota**, 105 N. W. 408, 96 Minn. 441, 3 L. R. A. (N. S.) 114; **Marbut v. Empire Life Ins. Co.**, 85 S. E. 834, 143 Ga. 654; **Grant v. Mutual Protective League**, 192 Ill. App. 4; **Robinson v. Brotherhood of Locomotive Firemen and Engineers**, 87 S. E. 537, 170 N. C. 545; **Collins v. United Brothers of Friendship and Sisters of the Mysterious Ten (Tex. Civ. App.)** 192 S. W. 800; **Marcus v. National Council of Knights and Ladies of Security**, 143 N. W. 265, 123 Minn. 145.

In some cases it is stated that, where the false statement concerning age is a warranty, it will avoid the policy.

Krause v. Modern Woodmen of America, 133 Iowa, 199, 110 N. W. 452; **McCann v. Ladies of Maccabees of the World**, 182 Ill. App. 319.

A similar form of statement, in the case of accident insurance, is adopted in **Central Acc. Ins. Co. v. Spence**, 126 Ill. App. 32. In **Edmonds v. Modern Woodmen of America**, 102 S. W. 601, 125 Mo. App. 214, it was held that where an application for insurance showed that deceased was born in 1851, and also stated that he was between 44 and 45 years old at the time of the application, which statement was inconsistent, in that, if born in 1851, he must have been over 45 years, the insurer was put on inquiry to ascertain the true date of decedent's birth.

2024. (b) Effect as dependent on intent of applicant—Materiality of statement

2024 (b). A false statement of the age of the insured is a false statement on a matter material to the risk.

Taylor v. Grand Lodge A. O. U. W. of Minnesota, 105 N. W. 408, 96 Minn. 441, 3 L. R. A. (N. S.) 114; **Elliott v. Knights of the Modern Maccabees**, 46 Wash. 320, 89 Pac. 929, 13 L. R. A. (N. S.) 856; **Maddox v. Southern Mut. Life Ins. Ass'n**, 65 S. E. 789, 6 Ga. App. 681; **Central Acc. Ins. Co. v. Spence**, 126 Ill. App. 32; **Logia Suprema de La Alianza Hispano-Americana v. Aguirre**, 14 Ariz. 390, 129 Pac. 503.

2025-2027. (d) Effect as qualified by statutes, by-laws, or provisions of contract

2025 (d). In some cases statutory provisions have modified the general rule. Thus it was held in *Krause v. Modern Woodmen of America*, 133 Iowa, 199, 110 N. W. 452, that Code, § 1813, providing that the misrepresentation of age in an application for life insurance shall authorize the insurer to collect the difference of premium which would be due on account of the true age of the insured, etc., covers all cases where an insurance company has the power to insure the person to whom a policy has been issued. So in *Coplin v. Woodmen of the World*, 105 Miss. 115, 62 South. 7, Ann. Cas. 1916D, 1295, under the express provisions of Code 1906, § 2676, it was held that a misstatement of insured's age does not invalidate the contract of insurance, but merely limits the recovery to the amount which the premiums would have purchased at insured's actual age. Similarly in *Metropolitan Life Ins. Co. of New York v. Stiewing*, 173 Mo. App. 108, 155 S. W. 900, under Rev. St. 1909, § 6937, providing that misrepresentations in obtaining a life policy shall be disregarded, unless contributing to the death of the insured, it was held that the provisions in a policy that the amount payable shall be the insurance which the premiums would have purchased at the true age of the insured are void. This idea is further set forth in *Burns v. Metropolitan Life Ins. Co.*, 124 S. W. 539, 141 Mo. App. 212, where it was held that under Rev. St. 1899, § 7890 (Ann. St. 1906, p. 3746), providing that no misrepresentation in obtaining a life insurance policy shall affect its validity unless the misrepresentation actually contributed to the death of insured, the provisions of the policy that proof of the actual age of insured may be required with proofs of death, and the amount payable shall be the insurance which the premiums would have purchased at the true age, is void, though insured misstated his age in applying for the insurance.

2026 (d). Modifications due to provisions in the certificate of organization or by-laws often appear in the cases. Thus in *Erickson v. Ladies of the Maccabees of the World*, 126 N. W. 259, 25 S. D. 183, a by-law of a mutual benefit society provided that no benefit should be paid because of the death of a member who had given untrue answers, except that a member who understated her age in good faith should not thereby forfeit her certificate if under the age limit. It was held that the by-law related back to the original

application in all cases alike, whether insured was living or dead at the time of its adoption.

In *Fraternal Tribunes v. Steele* (1904) 114 Ill. App. 194, affirmed *Steele v. Fraternal Tribunes*, 74 N. E. 121, 215 Ill. 190, 106 Am. St. Rep. 160, the certificate of organization of a beneficial association provided that it should insure persons not over 51 years of age. It was held, under Act June 22, 1893 (Laws 1893, p. 130), as amended by Act July 1, 1899 (Hurd's Rev. St. 1899, p. 1030, c. 73), that a member having given his age under 51 years, when in fact he was over that age, the contract was ultra vires and unenforceable, though it had been performed in good faith by the insured and the corporation had had full benefit of the performance. In *Taylor v. Grand Lodge, A. O. U. W. of Minnesota*, 105 N. W. 408, 96 Minn. 441, 3 L. R. A. (N. S.) 114, where a beneficiary certificate was issued to an applicant on his false statement that he was 44 years of age, the laws of the order restricting membership to persons under 45, when, as a matter of fact, he was more than 45 years of age at the time the certificate was issued, it was null and void ab initio. In *Pirrung v. Supreme Council of Catholic Mut. Ben. Ass'n*, 93 N. Y. Supp. 575, 104 App. Div. 571, the by-laws of an insurance association provided that no person should be entitled to initiation who was over 50 years of age. The beneficiaries of a member who was more than 50 years of age at the time he joined the society could not recover on the certificate, in the absence of proof that such member was induced to join by false or fraudulent representation as to his eligibility, or that he paid assessments on the faith of any such representation, whether his statement as to age was a warranty or only a representation.

In *Harvick v. Modern Woodmen of America*, 158 Ill. App. 570, it was held that where the by-laws of a society provide that applicants for insurance must be over 18 and under 45 years of age, a warranty by an applicant that he was of eligible age, if untrue, will relieve the society of the obligation of payment, unless the society has waived the breach. In *Waltz v. Workmen's Sick and Death Benefit Fund of the United States of America* (Sup.) 141 N. Y. Supp. 578, reversing judgment 139 N. Y. Supp. 1016, 78 Misc. Rep. 499, it was held that all claims of a beneficiary against a fraternal benefit society became void because of misrepresentations by insured that he was 42 years, when he was in fact 46 years, of age, so as to be ineligible to membership; the constitution providing that all claim of the beneficiary against the society shall be void in case

of false statements made by deceased upon his admission. In *Harvick v. Modern Woodmen of America*, 158 Ill. App. 570, it was held that, where the by-laws of a society provide that applicants for insurance must be over 18 and under 45 years of age, a warranty by an applicant that he was of eligible age, if untrue, will relieve the society of the obligation of payment, unless the society has waived the breach. In the same case it was also held that it is competent for a fraternal benefit society to require an applicant for insurance not only to warrant his actual age, but his precise date of birth and that such warranties where made are separate and distinct.

Modifications due to provisions in the policy also appear in the cases. Thus in *Johnson v. American Nat. Life Ins. Co.*, 68 S. E. 731, 134 Ga. 800, a policy provided that, if the age of insured was incorrectly stated, the amount payable under the policy should be the amount which the actual premiums would have purchased at the true age. The age stated in the policy was 55 years. Defendant pleaded fraud, alleging that insured was more than 70 years, and uninsurable. It was held that the misrepresentation was material. So in *Germania Life Ins. Co. of New York City v. Klein*, 137 Pac. 73, 25 Colo. App. 326, a misrepresentation as to age by representing that applicant was 50 years old at her nearest birthday, while in fact 63, defeats only the policy pro tanto where the contract so provides, and insurer is liable to the amount of the insurance which the premium paid would have purchased at the age of 63.

2028-2029. (f) Pleading and practice—Presumptions and burden of proof

2028 (f). In action on a policy of fraternal insurance by beneficiary named, the presumption would be that deceased stated her correct age in her application for insurance, and it devolved upon defendant to prove contrary.

Gurley v. Massac County Mutual Relief Ass'n, 186 Ill. App. 492;
Collins v. United Brothers of Friendship and Sisters of the Mysterious Ten (Tex. Civ. App.) 192 S. W. 800.

2029-2032. (g) Same—Admissibility of evidence

2029 (g). In *McCann v. Ladies of Maccabees of the World*, 182 Ill. App. 319, it was held that the mere statement in the application of the age of applicant is not evidence of such fact. In *Johnson v. American Nat. Life Ins. Co.*, 68 S. E. 731, 134 Ga. 800, a policy

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provided that, if the age of insured was incorrectly stated, the amount payable under the policy should be the amount which the actual premiums would have purchased at the true age. The age stated in the policy was 55 years. Defendant pleaded fraud, alleging that insured was more than 70 years, and uninsurable. It was held that the rate book of the company, showing that there was no rate on a person 70 years of age, was admissible. It was also held that under the issue of fraud in procurement of a policy by misrepresentations as to age, it was competent to show the false representations as to age and health, and what they were in fact.

In *Krause v. Modern Woodmen of America*, 110 N. W. 452, 133 Iowa, 199, in an action on a benefit certificate, the insurer alleged that the insured represented in his application that he was 44 years of age, while he was 47 years of age, and that under its by-laws no certificate would be issued to a person after attaining the age of 45 years. It was held that the difference in the age of the insured and the age stated in the application would be taken into account in determining the amount to which the beneficiary was entitled, under Code, § 1813, providing that misrepresentation of age in the application shall authorize insurer to collect the difference of premium.

2032-2033. (h) Same—Weight and sufficiency of evidence

2033 (h). In the following cases the evidence was held sufficient to show that the statement in the application as to the age of the insured was false: *Daffron v. Modern Woodmen of America*, 190 Mo. App. 303, 176 S. W. 498; *Wynn v. Provident Life & Trust Co. of Philadelphia*, 91 N. Y. Supp. 167, 99 App. Div. 103; *Meehan v. Supreme Council Catholic Benev. Legion*, 88 N. E. 1125, 194 N. Y. 577, affirming 88 N. Y. Supp. 821, 95 App. Div. 142; *Criscuolo v. Societa Monarchica Di Mutuo Soccorso Vittorio Emanuele III*, 89 Conn. 249, 93 Atl. 532.

In the following cases the evidence was held insufficient to show that the statement in the application as to the age of the insured was false: *Edmonds v. Modern Woodmen of America*, 102 S. W. 601, 125 Mo. App. 214; *Metropolitan Life Ins. Co. v. Lennox*, 124 S. W. 623, 103 Tex. 133.

In the following cases the evidence was held sufficient to show that the statement as to the age of the insured was true: *Lincoln Reserve Life Ins. Co. v. Morgan*, 191 S. W. 236, 126 Ark. 615; *Palmer v. Loyal Mystic Legion of America*, 126 N. W. 285, 86 Neb.

596; *Lowenstein v. Old Colony Life Ins. Co.*, 166 S. W. 889, 179 Mo. App. 364.

In *Mutual Reserve Life Ins. Co. v. Jay* (Tex. Civ. App.) 101 S. W. 545, evidence, in an action on a life policy was held sufficient to go to the jury on the question of the age of insured being correctly stated in the application for the policy.

2033-2034. (1) Trial—Questions for jury and instructions

2033 (i). It is a general principle that the truth or falsity of the statements as to the age of the insured is for the jury.

Mutual Reserve Life Ins. Co. v. Jay, 50 Tex. Civ. App. 185, 109 S. W. 1116; *Gurley v. Massac County Mutual Relief Ass'n*, 186 Ill. App. 492; *Evans v. Modern Woodmen of America*, 147 Mo. App. 155, 129 S. W. 485.

The materiality of such statements is also for the jury.

Spence v. Central Accident Ins. Co., 86 N. E. 104, 236 Ill. 444, 19 L. R. A. (N. S.) 88; *Coughlin v. Metropolitan Life Ins. Co.*, 76 N. E. 192, 189 Mass. 538; *Gurley v. Massac County Mutual Relief Ass'n*, 186 Ill. App. 492.

In *Coughlin v. Metropolitan Life Ins. Co.*, 76 N. E. 192, 189 Mass. 538, under Rev. Laws, c. 118, § 21, which provides that no misrepresentation or warranty in the negotiation of a life policy shall be deemed material or defeat the policy, unless made with actual intent to deceive, or unless the matter increased the risk, it was held that the question whether a representation by insured in an endowment policy that he was 22 years of age, when in fact he was 30, was made with intent to deceive or increased the risk, was a question for the jury.

In *McCann v. Ladies of Maccabees of the World*, 182 Ill. App. 319, it was held that, where the uncontradicted evidence clearly shows that the member falsely stated her age and that her age was beyond the limit fixed by statute, the court is justified in taking the case from the jury and directing a verdict for plaintiff to the extent of the amount tendered by defendant.

In *Edmonds v. Modern Woodmen of America*, 102 S. W. 601, 125 Mo. App. 214, it was held that where an application for insurance stated that decedent was born in 1851, and was between 44 and 45 years old at the time the application was made, which statements were inconsistent, defendant was not prejudiced by an instruction that it was admitted that deceased was born in 1851; that, when he made the application, he was 45 years old, and, if he truly

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stated the day of his birth, then the date so given would control the subsequent statement that he was between 44 and 45.

In *Harvick v. Modern Woodmen of America*, 158 Ill. App. 570, it was held that, where a fraternal benefit society requires the applicant to warrant not only his actual age but his precise date of birth, such warranties are separate and distinct, and it is error for the court by its instructions to treat them as constituting one and the same defense.

9. EFFECT OF MISREPRESENTATION OR BREACH OF WARRANTY AS TO STATUS—MARRIED OR SINGLE

2034-2036. (a) In general

2034 (a). In *Continental Casualty Co. v. Lindsay*, 69 S. E. 344, 111 Va. 389, it was held that in an action by a beneficiary under a casualty policy, where the beneficiary testified that she was never legally married to the insured, it was held error to refuse to charge that, if the jury believed from the evidence that the insured willfully misrepresented in his application that his beneficiary was his wife, they should find for defendant.

10. EFFECT OF MISREPRESENTATION OR BREACH OF WARRANTY AS TO RESIDENCE AND PLACE OF BIRTH

2036-2038. (a) In general

2036 (a). In *Mutual Reserve Life Ins. Co. v. Jay*, 109 S. W. 1116, 50 Tex. Civ. App. 165, it was held that, in an action on a life insurance policy, whether declarations of the father of insured as to the place of birth of insured were true was for the jury.

In *Blackstone v. Kansas City Life Ins. Co.*, 107 Tex. 102, 174 S. W. 821, reversing (Tex. Civ. App.) 143 S. W. 702, in view of form of printed application for insurance, statement that applicant was born and resided at B. was held substantially true, though he was born and resided seven miles from B. on a farm.

11. EFFECT OF MISREPRESENTATION, BREACH OF WARRANTY OR CONCEALMENT AS TO OCCUPATION OF INSURED**2039. (a) Effect in general**

2039 (a). In *Hartmann v. National Council of Knights and Ladies of Security*, 175 S. W. 212, 190 Mo. App. 92, it was held that under Rev. St. Mo. 1909, §§ 6937, 7109, misrepresentations by a member as to his age and occupation would bar recovery on the fraternal policy.

In *Clair v. Supreme Council of the Royal Arcanum*, 155 S. W. 892, 172 Mo. App. 709, it is held to be competent for a fraternal beneficiary society and its members to provide, in the contract of insurance and by-laws what occupations shall not be pursued under the penalty of forfeiture of the certificate, and the court will enforce contracts so made.

2039-2040. (b) Effect as dependent on materiality of fact

2039 (b). Statements of assured as to his employment in conflict with those in the application are material on the question of occupation and on the question of truth of statements in the application (*McManus v. Peerless Casualty Co.*, 95 Atl. 510, 114 Me. 98). But false statements in application for policy as to the name of insured's employer, his duties, and his relationship toward the beneficiary have been held not to avoid the policy (*Moore v. Prudential Casualty Co.*, 156 N. Y. Supp. 892, 170 App. Div. 849).

2041-2043. (c) What constitutes a false answer as to occupation

2041 (c). In *Supreme Lodge Knights and Ladies of Honor v. Baker*, 50 South. 958, 163 Ala. 518, it was said that "occupation" means that which practically takes up one's time and energies, especially one's regular business or employment. One might have a regular occupation, such as that of painter and be out of employment, and might temporarily engage in other business, and still give his occupation as a painter. It was also said that one who has once had and followed an occupation continues to have it till he has abandoned it, either by quitting work in it without intention or ability to resume it, or by engaging in some other occupation not of a mere temporary character.

In *Peterson v. Time Indemnity Co.*, 140 N. W. 286, 152 Wis. 562, a statement in an insured's application that his occupation was

"supervising a dray line only" was held not to avoid the policy, where he was engaged exclusively in the dray business, but not solely in directing the work of subordinates; "supervision" not necessarily excluding all manual labor.

In *Creem v. Fidelity & Casualty Co. of New York*, 116 N. Y. Supp. 1042, 132 App. Div. 241, where plaintiff, who undertook to build the foundations for the pillars of an elevated railroad, stated in his application for a liability policy that his business was "general contractor, sewer construction," and the work was quite similar to sewer construction, the court held that it could not be said that there was a breach of warranty as a matter of law.

In *Denoyer v. First Nat. Accident Co.*, 130 N. W. 475, 145 Wis. 450, the applicant for the policy represented himself to be a miller, and at, about, or after the time of making application for the policy he attached to his flour mill a circular saw for cutting logs into lumber. It was held that, although operating a circular saw was a prohibited occupation with the insurance company, the applicant made no false representations as to his occupation.

In *Wilder v. Continental Casualty Co.*, 150 Fed. 92, 80 C. C. A. 46, the occupation was put down as "Superintendent Inspection." There was no class by that name given in defendant's manual, but there was one covering inspectors of ties and timber in which the policy was limited to a smaller amount than that in suit. It was further shown that the duties of the insured consisted in making inspection of ties and timbers and in superintending inspections made by others, and defendant's agent testified that insured stated at the time of the application that he had both office and traveling duties, but did not personally make inspections. The court held that it could not be said as matter of law from such evidence that the occupation of the insured was not substantially that described in the application, but that such question was one for the jury.

On the other hand, representation in an application for accident insurance that a professional gambler's occupation was capitalist is false and material (*Elliott v. Frankfort Marine, Accident & Plate Glass Ins. Co. of Frankfort-on-the-Main, Germany*, 156 Pac. 481, 172 Cal. 261, L. R. A. 1916F, 1026).

The question has sometimes arisen under by-laws of the insurer. Thus in *Head Camp, Pacific Jurisdiction, Woodmen of the World, v. Irish*, 127 Pac. 918, 23 Colo. App. 85, it is held that a by-law of a beneficial association, providing that one to become a member "must not be engaged as a miner, nor one engaged about mines,

whose duties require him to enter into mines at any time," and that the beneficiary of "persons working underground shall receive 70 per cent. of the face value of his certificate," does not refer to mining engineers. So that plaintiff's work was shoveling concrete in covered excavation did not render his statement as to occupation in application for industrial policy, "no tunneling," a misrepresentation of material fact (*Vinginerra v. Commercial Casualty Ins. Co.* [Sup.] 156 N. Y. Supp. 573).

In *Cook v. Modern Brotherhood of America*, 131 N. W. 334, 114 Minn. 299, the by-laws of a fraternal benefit association, made a part of its certificates, provided that railway freight brakemen and switchmen should be ineligible to beneficial membership. It was held that a certificate holder whose employment was that of mining brakeman on trains used for shipping purposes, his duty being to spot the stripping cars when being loaded in the open pit mine and when unloaded at the dump, was not a railway freight brakeman or switchman within the by-laws.

2042 (e). An admission by an applicant for an accident policy that he was a farm foreman would necessarily be limited to the time when it was made, and was not an admission that this was his occupation when he was subsequently injured by accident (*Provident Life & Accident Ins. Co. of Chattanooga, Tenn., v. Black* [Ala. App.] 73 South. 757).

2043-2044. (f) Sufficiency of disclosure

2043 (f). In *Haley v. Supreme Court of Honor*, 139 Ill. App. 478, it was held that a certificate would not be avoided by a statement by the applicant to a general question that he was not a "plow polisher," when in answer to another question he stated that he was a laborer, and the society did not specifically seek to ascertain what kind of labor he performed.

2044-2045. (g) Manufacturing or dealing in intoxicating liquors

2044 (g). It is a reasonable rule for a fraternal insurance association to exclude barkeepers from membership (*Klein v. Supreme Council of Loyal Ass'n*, 155 N. Y. Supp. 580, 92 Misc. Rep. 216).

In *Sweeney v. Life Ass'n of America*, 152 Ill. App. 173, it was held that to state in an application for insurance that the applicant has no interest in or connection with the sale or manufacture of beer is not false, though the applicant is connected with the real estate department of a brewing corporation. In *Blackstone v. Kansas*

City Life Ins. Co., 107 Tex. 102, 174 S. W. 821, a representation that applicant had never been engaged in, or connected with, manufacture of liquors was held not to invalidate policy, though, when a boy, he had worked about his father's still.

In *National Council Junior Order United American Mechanics v. Thompson*, 156 S. W. 132, 153 Ky. 636, 45 L. R. A. (N. S.) 1148, an administrator of a decedent operating a saloon under a license, who procured a renewal for three years in his own name, and who conducted the saloon business for the benefit of decedent's estate was held within the by-laws of a fraternal order prohibiting insurance to persons engaging as proprietor or agent in the sale of liquor. In *Smith v. Chapter General, Knights of St. John and Malta*, 128 N. Y. Supp. 288, 143 App. Div. 532, rehearing denied 144 App. Div. 908, 128 N. Y. Supp. 1146, it was provided by the constitution of a fraternal benefit insurance order that applications shall not be received from persons who sell intoxicating liquors to be drunk on the premises, and also provided in the application thereto of one, who must have known that his business of saloonkeeper made him ineligible to membership, that any false statement, concealment, or "evasion of facts" in his application would render the certificate void. The applicant's statement that he was a "merchant," in the absence of waiver or estoppel, was held a defense to action on his benefit certificate.

In *Collins v. Metropolitan Life Ins. Co.*, 80 Pac. 609, 32 Mont. 329, 108 Am. St. Rep. 578, rehearing denied 80 Pac. 1092, 32 Mont. 329, 108 Am. St. Rep. 578, it was held that, where insured warranted that he was not in any way connected with the manufacture or sale of liquors the word "connected" must be presumed to have been used in its popular sense, as provided by Civ. Code, § 2209, so that proof that insured occasionally waited on the customers of a saloon keeper for his accommodation merely, and without consideration—insured having no financial or other interest in the saloon—did not establish a breach of warranty of a life policy.

2045-2046. (h) Same—Laws and regulations of insurer

2045 (h). In *Supreme Council of Royal Arcanum v. Urban*, 137 Ill. App. 292, it was held that a by-law which excludes from benefits the beneficiaries of a member who is a "barkeeper or other person who sells or serves intoxicating liquors," does not exclude one who is engaged in the business of selling intoxicating liquors without himself selling or serving them.

In *Supreme Tribe of Ben Hur v. Lennert* (Ind. App.) 93 N. E. 869, rehearing denied 94 N. E. 889, where insured, when he joined defendant benefit association, was a teamster of a brewing company and required to solicit orders for beer, deliver the same, and collect money therefor, he was disqualified from membership under a by-law providing that no person engaged as principal, agent, or servant in the sale of liquors as a beverage shall be admitted, and, if any member, after admission, shall engage in such prohibited occupation, he shall stand suspended, etc.

2048-2049. (k) Practice—Evidence

2048 (k). In *Collins v. Metropolitan Life Ins. Co.*, 80 Pac. 609, 32 Mont. 329, 108 Am. St. Rep. 578, rehearing denied 80 Pac. 1092, 32 Mont. 329, 108 Am. St. Rep. 578, it was held that, where insurer claimed a breach of warranty that insured was not connected with the sale of liquor, evidence that insured received no consideration for an occasional service rendered to a saloon keeper was material, as tending to show the exact relation of insured to the saloon keeper's business.

In *Supreme Lodge Knights and Ladies of Honor v. Baker*, 50 South. 958, 163 Atl. 518, it was held that, witness having testified that he could not recall whether deceased quit the railroad or was discharged, "My best recollection is that his services were unsatisfactory," the latter part was properly excluded, on objection, as having no bearing on any issue. It was also held in the same case that the question, to the doctor who examined one for insurance, whether there was any indication of his habitual use of alcoholic or other stimulants, was proper in an action on the benefit certificate, in which a defense was that insured falsely answered the question as to whether he used such stimulants, and that whether insured gambled straight or crooked was irrelevant, in an action on a benefit certificate, in which the defense was that the occupation of insured was that of a gambler and loafer, while he had stated in his application that it was that of a railroad clerk.

In *Brotherhood of Railroad Trainmen v. Swearingen*, 171 S. W. 455, 161 Ky. 665, evidence was held to sustain a finding that the insured did not make false statements in regard to his employment.

2049-2051. (l) Same—Trial

2049 (l). In *Perry v. John Hancock Mut. Life Ins. Co.*, 106 N. W. 860, 143 Mich. 290, it was held that, where there was no attempt made to dispute defendant's proof that assured was in fact engaged

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in keeping a house of ill fame, it was error to submit the question whether she was so engaged to the jury. It was also held in the same case that whether the keeper of a house of ill fame is a housewife, as stated by her in an application for a policy of insurance, was for the jury.

In *Wilder v. Continental Casualty Co.*, 150 Fed. 92, 80 C. C. A. 46, it was held that, on the evidence submitted, whether the occupation of the insured was misdescribed was a question for the jury.

12. EFFECT OF MISREPRESENTATION, BREACH OF WARRANTY, OR CONCEALMENT AS TO USE OF ALCOHOLIC STIMULANTS, DRUGS, AND NARCOTICS

2051-2053. (a) Effect of false statements in general

2051 (a). A false statement as to habits, as to the use of liquor, will, if material, avoid the policy.

Metropolitan Life Ins. Co. v. Ford, 126 Ky. 49, 102 S. W. 876, 31 Ky. Law Rep. 513; *Langdeau v. John Hancock Mut. Life Ins. Co.*, 80 N. E. 452, 194 Mass. 56, 18 L. R. A. (N. S.) 1190; *Marren v. North American Union*, 145 Ill. App. 375; *Franklin Life Ins. Co. v. American Nat. Bank*, 84 S. W. 789, 74 Ark. 1.

A statement by insured as to his habits with reference to intoxicants must be construed as to his habits at the time of his application, not before or after (*Order of United Commercial Travelers v. Simpson* [Tex. Civ. App.] 177 S. W. 169).

In *Maloney v. Maryland Casualty Co.*, 167 S. W. 845, 113 Ark. 174, it was held that, where an application for accident insurance stated that the applicant's habits were correct and temperate; that he was not subject to certain specified disabilities and was sound except as follows: No exceptions—the words “no exceptions” refer to the freedom from disability, and not to the statement as to habits.

In *Royal Union Mut. Life Ins. Co. v. Wynn*, 177 Fed. 289 (U. S. C. C., Ga., 1910), it was held that, where insured was not an excessive drinker and his death was not caused by his use of intoxicants, his misstatement of the kind or quantity of liquors consumed daily or his failure to state certain facts with reference thereto not material to the risk, was no defense to the policy, nor ground for voiding it, under Civ. Code Ga. 1895, §§ 2097-2099, 2101, regulating the effect of concealment and misrepresentations in an application for insurance.

A representation that an applicant for accident insurance who was living with a woman other than his wife was of good habits is

a material misrepresentation (*Elliott v. Frankfort Marine, Accident & Plate Glass Ins. Co. of Frankfort-on-the-Main, Germany*, 156 Pac. 481, 172 Cal. 261, L. R. A. 1916F, 1026).

2053-2054. (b) Materiality of statements

2053 (b). Representations by an applicant for insurance that he did not use any liquors, wines, or spirits are material to the risk.

Forwood v. Prudential Ins. Co. of America, 83 Atl. 189, 117 Md. 254;
Provident Sav. Life Assur. Soc. v. Dees, 86 S. W. 522, 120 Ky. 285,
27 Ky. Law Rep. 670.

But, according to *Metropolitan Life Ins. Co. v. Ford*, 102 S. W. 876, 126 Ky. 49, unless representations are substantially untrue, they are not misrepresentations precluding recovery on the policy.

In *Hoagland v. Modern Woodmen of America* (1911) 157 Mo. App. 15, 137 S. W. 900, it was held that answers in an application for insurance in a fraternal association that the insured abstained entirely from the use of intoxicating liquors, and had always been a total abstainer, are warranties. On the other hand, in *Maloney v. Maryland Casualty Co.*, 113 Ark. 174, 167 S. W. 845, it was held that a statement, in an application for accident insurance, that the applicant's habits of life were correct and temperate is not a warranty; and where plaintiff warranted his habits of life correct and temperate, evidence of sexual perversion some years previous has been held too remote (*Lamport v. General Accident, Fire & Life Assur. Corp.*, 197 S. W. 95).

In *Mutual Life Ins. Co. v. Mullan*, 107 Md. 457, 69 Atl. 385, it was held that where insured was treated for delirium tremens within five months before he made application, and drank intoxicants very much in excess of one glass of beer a day, as represented in his application, the misrepresentations, along with others on state of his health, were material to the risk so as to avoid the policy.

2054. (c) Knowledge and intent of applicant

2054 (c). According to *Provident Sav. Life Assur. Co. v. Dees*, 86 S. W. 522, 120 Ky. 285, 27 Ky. Law Rep. 670, a material misrepresentation in answer to a question relating to the habits of the insured in respect to the use of liquor avoids the policy, even though there was no intention to deceive or mislead the insurer.

However, in *Daniel v. Modern Woodmen of America*, 53 Tex.

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Civ. App. 570, 118 S. W. 211, it is held that statements of the applicant for insurance that he has never been intoxicated are statements of opinion, and, where the applicant in good faith believes them, their falsity will not vitiate the certificate warranting the truth of the answers.

2055-2056. (d) Sufficiency of disclosure

2055 (d). According to *O'Connor v. Modern Woodmen of America*, 110 Minn. 18, 124 N. W. 454, an incomplete answer to a question in an application for life insurance, truthful as far as responsive, does not vitiate the policy, in the absence of fraud or intentional concealment.

In *Schon v. Modern Woodmen of America*, 99 Pac. 25, 51 Wash. 482, it was held that where insured, in answer to questions stated that he drank beer once in a great while, that he was almost a total abstainer, and that he had always been a total abstainer, the insurer could not void the certificate because he had in another question misstated that he had always been a total abstainer.

In *Keatley v. Grand Fraternity*, 2 Boyce (Del.) 267, 78 Atl. 874, it was held that a question asked an applicant for fraternal insurance, "What is your daily practice in regard to the use of * * * liquors?" calls for information as to whether the applicant has a liquor habit to the extent of being a daily habit, and where he has no such habit, an answer to that effect is truthful, though at times he drank to excess; the word "practice," when used in connection with the word "daily," suggesting the idea of doing a thing regularly, and signifying a habit or regular conduct. In this case it was also held that where a question in an application for fraternal insurance, framed by insurer, is ambiguous, and thus permits an applicant to make responsive answers in different ways, the question must be construed most strongly against insurer.

The sufficiency of disclosure was also considered in *Keatley v. Grand Fraternity* (D. C.) 198 Fed. 264.

**2056-2057. (f) What constitutes temperate or intemperate habits
—Temperance does not mean total abstinence**

2056 (f). In *O'Connor v. Modern Woodmen of America*, 110 Minn. 18, 124 N. W. 454, it was held that the expression, "intemperate use of intoxicating liquors," in a contract of insurance, means such indulgence in intoxicants as tends to impair the health of the insured or renders the risk more hazardous.

In *Hann v. Supreme Ruling of Fraternal Mystic Circle*, 140 N.

Y. Supp. 666, 155 App. Div. 665, it was held that express warranty by insured in applying for membership that he did not drink to excess, followed by details as to his use of intoxicants, and his acceptance as a member, held a construction by the parties as to what was excessive use, so that a denial of excessive use in an application for reinstatement was true as between the parties though insured continued to drink as before.

2057-2059. (g) Same—Occasional use of liquors

2057 (g). A man is not of intemperate habits within the meaning of an insurance policy because he occasionally uses intoxicating liquors and sometimes to excess (*Fludd v. Equitable Life Assur. Soc. of United States*, 55 S. E. 762, 75 S. C. 315).

Questions in an application, "to what extent do you use alcoholic stimulants?" etc., refer to the customary or habitual use, and not to an occasional use thereof, or an exceptional use to excess.

Metropolitan Life Ins. Co. v. Shane, 98 Ark. 132, 135 S. W. 836; *Knights of Maccabees v. Anderson*, 104 Ark. 417, 148 S. W. 1016.

The words, "addicted," "practice," "use," "habit," as applied to the use of intoxicating liquors, refer to the habitual or customary use of liquor, and not to an occasional or exceptional use.

Mutual Reserve Fund Life Ass'n v. Cotter, 81 Ark. 205, 99 S. W. 67; *Columbia Life Ins. Co. v. Tousey*, 153 S. W. 767, 152 Ky. 447; *Aris v. Mutual Life Ins. Co. of New York*, 103 Pac. 50; *Id.*, 103 Pac. 53, 54 Wash. 269, 695; *Edwall v. Same*, 103 Pac. 52, 54 Wash. 695; *Haystead v. Same*, 103 Pac. 53, 54 Wash. 695; *Des Moines Life Ins. Co. v. Clay*, 116 S. W. 232, 89 Ark. 230.

2061-2064. (k) Pleading and practice—Evidence

2061 (k). In *Langdeau v. John Hancock Mut. Life Ins. Co.*, 194 Mass. 56, 80 N. E. 452, 18 L. R. A. (N. S.) 1190, it was held that on an issue of false representations, in an application for life insurance, that assured had never used intoxicating liquors to excess, evidence that for a long period prior to such application he had been addicted to habits of intoxication, and had previously pleaded guilty to a charge of drunkenness, was admissible.

In *Supreme Tribe of Ben Hur v. Cosgrove*, 169 S. W. 999, 160 Ky. 595, 161 Ky. 484, it was held that, on an issue of insured's intemperate use of liquor, evidence of his conviction on a charge of drunkenness or disorderly conduct is inadmissible. On the other hand, it was held, in *Supreme Tribe of Ben Hur v. Cosgrove*, 169 S. W. 999, 160 Ky. 595, 161 Ky. 484, that, on an issue of insured's in-

temperate use of liquor, evidence of his conviction on a charge of drunkenness or disorderly conduct was inadmissible.

In *Fidelity Mut. Life Ins. Co. v. Miazza*, 93 Miss. 18, 46 South. 817, 136 Am. St. Rep. 534, it was held that where, in an application for insurance, insured warranted that he had never used intoxicants, habitually or to excess, evidence of three physicians that in October, 1903, he suffered from acute mania, partly due to alcoholism, was admissible to show misrepresentation.

In *Supreme Lodge Knights & Ladies of Honor v. Baker*, 163 Ala. 518, 50 South. 958, it was held that the question to the doctor who examined one for insurance, whether there was any indication of his habitual use of alcoholic or other stimulants, was proper in an action on the benefit certificate, in which a defense was that insured falsely answered the question as to whether he used such stimulants.

In *Paquette v. Prudential Insurance Co. of America*, 79 N. E. 250, 193 Mass. 215, it was held that in an action on a policy a description of the physical appearance of assured was competent to rebut defendant's testimony that insured appeared to be in unsound health and that his general appearance indicated excessive use of intoxicants.

In *Brotherhood of Locomotive Firemen and Enginemen v. Cole*, 108 Ark. 527, 158 S. W. 153, it was held that in an action on a fraternal benefit policy applied for in November, 1911, in which defendant relied upon misrepresentations as to the use of intoxicants, evidence as to insured's habits as to intoxicants from August, 1912, to the time of trial was not admissible, but that evidence as to insured's habits as to the use of intoxicants during a period immediately succeeding the date of the application might be admissible.

In *Paquette v. Prudential Ins. Co. of America*, 79 N. E. 250, 193 Mass. 215, it was held that where insurer pleaded that certain policies sued on were avoided by material misrepresentations of insured as to his health and habits of sobriety, the burden of proving such allegations was on defendant.

In *Columbia Life Ins. Co. v. Tousey*, 153 S. W. 767, 152 Ky. 447, it was held that a denial of an applicant for insurance that he had ever taken any special treatment for inebriety was not falsified by proof that 15 or 20 years before the date of the application he had taken the Keeley treatment, in the absence of proof of the reason therefor, and that a statement, in an application for a life policy, that the applicant had not been intoxicated within the preceding

five years was not falsified by proof of two witnesses that they had each seen the applicant intoxicated on one occasion not within such period.

The sufficiency of evidence was considered in the following cases: *Mutual Life Ins. Co. of New York v. Mullan*, 107 Md. 457, 69 Atl. 385; *Lakka v. Modern Brotherhood of America*, 163 Iowa, 159, 143 N. W. 513, 49 L. R. A. (N. S.) 902; *Metropolitan Life Ins. Co. v. De Vault's Adm'x*, 109 Va. 392, 63 S. E. 982, 17 Ann. Cas. 27; *Metropolitan Life Ins. Co. v. Ford*, 102 S. W. 876, 126 Ky. 49; *Modern Woodmen of America v. International Trust Co.*, 25 Colo. App. 26, 136 Pac. 806.

2064-2065. (1) Same—Trial

2064 (1). In *Des Moines Life Ins. Co. v. Clay*, 116 S. W. 232, 89 Ark. 230, defendant requested an instruction submitting the question whether insured "was addicted to the use of intoxicating liquors," in contradiction to the answer in his application that he did not use such liquors. The court modified the instruction by inserting the words "habitual or customary" before the word "use." It was held, that the modification did not change the meaning of the instruction.

In *Supreme Lodge Knights and Ladies of Honor v. Baker*, 163 Ala. 518, 50 South. 958, it was held that the pleas having averred that insured answered, "No," to the question, "Do you use alcoholic or other stimulants?" and that he did, at the date of making said answer, and previously thereto, and at the issuance of the policy, use alcoholic or other stimulants habitually and in the ordinary course of his life, it was not error to give plaintiff's requested charge, that in order to find a verdict for defendant, on the ground that insured used alcoholic or other stimulants, the jury must believe that when he made his application it was his habit to use alcoholic or other stimulants, this substantially following the pleas.

In *Gall v. Sovereign Camp of Woodmen of the World*, 166 Mich. 690, 132 N. W. 468, the trial court charged the jury that the term "intoxicated" was defined as "inebriated," "made drunk," "excited to frenzy," and that "it is a pretty strong definition when you get it right down to the intoxication." The upper court held that the definition of "intoxicated" was erroneous and prejudicial to defendant.

The propriety of instructions was also considered in *Jacoby v. Prudential Ins. Co. of America*, 94 Neb. 422, 143 N. W. 448.

In *Adams v. Modern Woodmen of America*, 145 Mo. App. 207, 130 S. W. 113, it was held that whether warranties made by one whose life was insured by a beneficial association as to his use of intoxicants were false held, under the evidence, jury questions.

13. EFFECT OF MISREPRESENTATION OR BREACH OF WARRANTY AS TO RELATIONSHIP OR INTEREST OF BENEFICIARY

2065-2067. (a) Relationship of beneficiary in general

2065 (a). In *Gaines v. Fidelity & Casualty Co. of New York*, 81 N. E. 169, 188 N. Y. 411, 11 Ann. Cas. 71, it was held, affirming 97 N. Y. Supp. 836, 111 App. Div. 386, that the statement of insured that the beneficiary was his wife being made a warranty by the policy, inquiry into its materiality is precluded, and its mere falsity bars recovery.

So in *Falberg v. Continental Casualty Co.*, 195 Ill. App. 237, it is stated that where an applicant for insurance states in his application that the beneficiary is his "wife," whereas she is not his wife, but a woman with whom he is sustaining illicit relations, the misrepresentation invalidates the contract.

On the other hand, in *Baltimore Life Ins. Co. v. Floyd*, 5 Boyce (Del.) 201, 91 Atl. 653, it was held that, where the beneficiary under a policy of life insurance had an insurable interest, insured's misrepresentation as to his relation to the beneficiary, not made in bad faith, was of a fact not materially affecting the risk assumed, and hence, not ground for avoidance of the policy; while in some cases it has been held that nothing can be false which lacks mala fides in the party making the statement challenged as false, and that an erroneous conclusion as to relationship does not void the policy.

Cunat v. Supreme Tribe of Ben Hur, 249 Ill. 448, 94 N. E. 925, 34 L. R. A. (N. S.) 1192, Ann. Cas. 1912A, 213, affirming 157 Ill. App. 138; *Afro-American Life Ins. Co. v. Adams*, 195 Ala. 147, 70 South. 119 (statutory).

In *Pacific Mut. Life Ins. Co. of California v. O'Neil*, 36 Okl. 792, 130 Pac. 270, it was held that, under the law in force in the Indian Territory before statehood, false answer to an inquiry as to the relationship between applicant and beneficiary, where such answer is made a warranty, vitiates the policy, though made in good faith and without knowledge of its falsity.

In *Continental Casualty Co. v. Lindsay*, 111 Va. 389, 69 S. E. 344, it was held that Acts 1906, p. 139, § 28, providing that statements or descriptions in any application for a policy of insurance shall be deemed representations and not warranties, unless such representations are material, will not cure the effect of a misrepresentation of an insured in his application that the beneficiary was his wife, when she was a woman with whom he was living in illicit relations; such representation being material.

A substantially contrary result was reached in *Lamport v. General Accident, Fire & Life Assur. Corp. (Mo.)* 197 S. W. 95, holding that in view of Rev. St. 1909, § 6937, false warranty in life policy that beneficiary who would be entitled to take benefits on death, was insured's wife, was not sufficient to avoid policy.

2067-2069. (b) Beneficiaries under rules of mutual benefit associations

2067 (b). In *Missey v. Supreme Lodge, Knights and Ladies of Honor*, 147 Mo. App. 137, 126 S. W. 559, it was held that where the constitution and by-laws of a mutual benefit life insurance company require the beneficiary to sustain a certain relationship to insured, and provide that every "certificate issued to a member who shall have designated in his application as beneficiary a person who is not entitled to take such benefit" shall be void, a certificate designating the beneficiary as "cousin, first degree," of insured, when not related to him in any degree, and not dependent on him for support, is void. A very similar position was taken in *Gray v. Sovereign Camp, Woodmen of the World*, 47 Tex. Civ. App. 609, 106 S. W. 176. But in *Cunat v. Supreme Tribe of Ben Hur*, 94 N. E. 925, 249 Ill. 448, 34 L. R. A. (N. S.) 1192, Ann. Cas. 1912A, 213, insured in a benefit certificate stated in her application that the beneficiaries named were her cousins, when one of them was not her cousin and was ineligible, and the certificate contained the usual covenants warranting representations to be true, and it was held that the certificate was not void.

In *Caldwell v. Grand Lodge of United Workmen*, 82 Pac. 781, 148 Cal. 195, 2 L. R. A. (N. S.) 653, 113 Am. St. Rep. 219, 7 Ann. Cas. 356, it was held that where a by-law of a beneficial association required a beneficiary to be a member of a member's family, related by blood, or dependent upon the member, a statement of a member that the beneficiary named by him was dependent upon him amounted to a warranty.

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2070-2071. (d) Questions of practice

2070 (d). In *Rizzo v. Catholic Order of Foresters*, 176 Ill. App. 165, it was held that where a by-law of a fraternal benefit society limits payment of death certificates, as respects cousins of the member, to first cousins, in an action by a beneficiary named as a "cousin" of the member, the burden is on the society to prove that such person is not such a cousin as can take.

In *Continental Casualty Co. v. Lindsay*, 111 Va. 389, 69 S. E. 344, it was held that in an action by a beneficiary to recover on a casualty policy, where it appeared that the insured had warranted that his beneficiary was his wife, evidence that she was merely his concubine was improperly rejected.

In *Langford v. National Life & Accident Ins. Co.*, 116 Ark. 527, 173 S. W. 414, Ann. Cas. 1917A, 1081, whether insured procuring a life policy payable to one having no insurable interest perpetrated a fraud on insurer in his application stating that the beneficiary was a relative was held to be a question for the jury.

In *Afro-American Life Ins. Co. v. Adams*, 195 Ala. 147, 70 South. 119, evidence in an action on an insurance policy was held not to show any fraud on the part of the insured, an ignorant colored woman, in stating incorrectly the relationship between herself and the beneficiary.

14. EFFECT OF MISREPRESENTATION, BREACH OF WARRANTY, OR CONCEALMENT AS TO REJECTION OF PRIOR APPLICATIONS FOR INSURANCE

2071-2072. (a) Effect of false statement—Materiality

2071 (a). A statement by an applicant for life insurance that he had never been examined for insurance and rejected is material, and, if false, avoids the policy, whether made as a warranty or as a representation.

Karaffa v. Supreme Court I. O. F., 159 Ill. App. 498; *Cundiff v. Royal Neighbors of America*, 144 S. W. 128, 162 Mo. App. 117; *Hardy v. Phoenix Mut. Life Ins. Co.*, 167 N. C. 22, 83 S. E. 5; *Mutual Life Ins. Co. of New York v. Hilton-Green*, 211 Fed. 31, 127 C. C. A. 467; *Fletcher v. Bankers' Life Ins. Co. of City of New York*, 119 N. Y. Supp. 801, 135 App. Div. 295; *Maryland Casualty Co. v. Eddy*, 239 Fed. 477, 152 C. C. A. 355.

A similar result is reached under statutes in some cases.

Langdeau v. John Hancock Mut. Life Ins. Co., 194 Mass. 56, 80 N. E. 452, 18 L. R. A. (N. S.) 1190 (Rev. Laws, c. 173, § 27); *Masonic Life*

Ass'n of Western New York v. Robinson, 147 S. W. 882, 149 Ky. 80, 41 L. R. A. (N. S.) 505 (Ky. St. § 630); Mutual Life Ins. Co. v. Dibrell, 137 Tenn. 528, 194 S. W. 581, L. R. A. 1917E, 554.

Even though such a statement should under the facts of the case be immaterial, if made as a warranty, its falsity renders the policy voidable.

Pacific Mut. Life Ins. Co. of California v. Glaser, 150 S. W. 549, 245 Mo. 377, 45 L. R. A. (N. S.) 222; Bonewell v. North American Accident Ins. Co., 132 N. W. 1067, 167 Mich. 274, Ann. Cas. 1913A, 847, affirming judgment on rehearing 125 N. W. 59, 160 Mich. 137.

In Genrow v. Modern Woodmen of America, 114 N. W. 1009, 151 Mich. 250, it was held that, where an application for a benefit certificate provided that if any answer or statement in the application was not literally true the certificate should be void, a false statement in the application that the applicant had not been rejected by any life insurance company, mutual benefit association, etc., avoided the certificate.

In Fraternal Tribunes v. Hanes, 100 Ill. App. 1, a plea that insured had answered falsely the question, "Have you ever been rejected?" was held, in view of the state of the pleadings, to set forth, not a breach of warranty, but a false representation merely, which in the absence of proof of its materiality, would not avoid the policy. (This statement corrects the statement of that case originally appearing in volume 3, Briefs on Insurance, p. 2072).

2072-2074. (b) What constitutes a false statement or concealment

2072 (b). A statement in an application for insurance that no application ever made by the applicant for insurance has been declined, being of doubtful meaning, will not be construed to include a prior rejection for life insurance, where the remaining clause of such statement and other statements in the application relate solely to accident, disease, or illness insurance.

Wright v. Fraternities Health & Accident Ass'n, 107 Me. 418, 78 Atl. 475, 32 L. R. A. (N. S.) 461; Dineen v. General Acc. Ins. Co., 110 N. Y. Supp. 344, 126 App. Div. 167; Mays v. New Amsterdam Casualty Co., 40 App. D. C. 249, 46 L. R. A. (N. S.) 1108.

In Fletcher v. Bankers' Life Ins. Co. of City of New York, 119 N. Y. Supp. 801, 135 App. Div. 295, it was held, reversing 116 N. Y. S. 1105, 62 Misc. Rep. 546, that where an applicant for life insurance knew when examined that he had applied to another company and a policy had not been issued, an answer stating that he

had never applied for insurance for which a policy was not issued was clearly false, though he was told by the examiner that he was postponed for a further examination.

In *Prudential Ins. Co. of America v. Moore*, 34 Sup. Ct. 191, 231 U. S. 560, 58 L. Ed. 367, a negative answer by an applicant to a question in the application as to whether he had been declined insurance by any other company was held to avoid the policy under Civ. Code Ga. 1910, §§ 2479, 2480, where in fact insured had two applications pending in other companies, and where he had withdrawn an application in another company after his rejection by its medical examiner.

In *Mutual Life Ins. Co. v. Summers*, 19 Wyo. 441, 120 Pac. 185, it was held that the answer "none" to a written application for life insurance, as to whether the applicant had ever made application to any company for insurance on his life on which a policy had been issued, and whether any such application was awaiting decision by any insurer, made after the soliciting agent had orally contracted to deliver a policy on a specified plan, merely showed that no application had been made to any other insurer; and the insurer, when sued by the applicant for the first premium paid, on the ground that the policy did not conform to the oral contract, could not urge that the written application was false by reason of his oral contract.

In *Supreme Lodge of the Fraternal Brotherhood v. Jones* (Tex. Civ. App.) 143 S. W. 247, it was held that a question to assured, in his application for membership in defendant fraternal benefit society, as to whether he had been rejected within six months, must be held to refer to rejection by defendant; the questions preceding and following such question relating to matters concerning membership in defendant order.

2075-2076. (e) Knowledge and intent of applicant

2075 (e). In *Langdeau v. John Hancock Mut. Life Ins. Co.*, 194 Mass. 56, 80 N. E. 452, 18 L. R. A. (N. S.) 1190, it was held that if insured's unqualified answer to an interrogatory concerning prior insurance that he had never been rejected or postponed was untrue, and was made with an actual intent to deceive, such misrepresentation avoided the policy.

In *Metropolitan Life Ins. Co. v. Ford*, 126 Ky. 49, 102 S. W. 876, 31 Ky. Law Rep. 513, it was held that representations in the application as to there having been no refusal of insurance do not pre-

vent a recovery, unless insured had knowledge of such refusal when the application for the policy sued on was signed.

In *Blenke v. Citizens' Life Ins. Co.*, 140 S. W. 561, 145 Ky. 332, it was held that, where an application for life insurance contains several questions calling for facts as to the applicant's prior history concerning which he was charged with knowledge, such as whether he had ever applied for insurance without receiving a policy within 30 days, whether he had ever been rejected, etc., and then asked whether he was in perfect health "so far as he knew or believed," the qualification quoted attached to such question should not be construed as applying to the others, so as to make the applicant's knowledge or belief a material part of his answers to the other questions calling for facts.

In *Metropolitan Life Ins. Co. v. Ford*, 126 Ky. 49, 102 S. W. 876, 31 Ky. Law Rep. 513, an applicant for a life policy stated in his application that applications for other insurance had not been rejected. The application was dated July 18th. He had applied for other insurance and the medical examiner on July 3d made a report thereon, rejecting the risk. It was not shown when the rejection was ordered made by the insurer, or that the applicant was notified thereof. This was held to authorize a finding that the applicant did not have knowledge of the rejection of his application for other insurance, and that his statements were not misrepresentations sufficient to defeat a recovery on the policy.

2076-2078. (f) What constitutes application and rejection

2076 (f). In *Ætna Life Ins. Co. v. Moore*, 34 Sup. Ct. 186, 231 U. S. 543, 58 L. Ed. 356, it was held that the answer, "No," to the question whether the applicant had applied for other insurance and had been rejected, constituted a misstatement under Civ. Code Ga. 1910, §§ 2479, 2480, though insured had withdrawn a prior application to another insurer after he had been rejected by its medical examiner.

In *Fletcher v. Bankers' Life Ins. Co. of City of New York*, 119 N. Y. Supp. 801, 135 App. Div. 295, it was held that an answer that applicant had never applied to another company and policy was not issued is false where he was told by examiner on earlier application to another company that he was postponed for further examination.

In *Supreme Lodge of the Fraternal Brotherhood v. Jones* (Tex. Civ. App.) 143 S. W. 247, however, it was held that, though an applicant for insurance, in answer to a question in his medical exam-

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ination, which required the answer of "yes" or "no," as to whether he had previously been rejected for membership in other orders, failed to disclose that a local examiner of another order had told him that his application would probably be rejected, his certificate was not invalidated where the local examiner had no authority to reject his application, and the opinion of such examiner was not contemplated by the question.

2079-2081. (h) Application to, and rejection by, mutual benefit associations

2079 (h). In *Peterson v. Manhattan Life Ins. Co.*, 91 N. E. 466, 244 Ill. 329, 18 Ann. Cas. 96, it was held, reversing the judgment in 115 Ill. App. 421, that the Modern Woodmen of America, a fraternal beneficiary society, is not an insurance company within the meaning of a question in an application for life insurance, "Have you ever been declined or postponed by any company?" and that a negative answer would not defeat recovery on the policy, although the insured had been rejected by this fraternal order.

A similar result was reached in *Lyon v. United Moderns*, 83 Pac. 804, 148 Cal. 470, 4 L. R. A. (N. S.) 247, 113 Am. St. Rep. 291, 7 Ann. Cas. 672, under Civ. Code Cal. § 451, declaring that benefit associations are not insurance companies within the insurance laws, recognizing a distinction between regular insurance companies and benefit associations. The same conclusion is also announced in *Shawnee Life Ins. Co. v. Watkins* (Okl.) 156 Pac. 181, under the Oklahoma statute, as applied to an application for a second certificate in the Endowment Rank of the Knights of Pythias, which had been rejected.

2082-2083. (i) Pleading and practice

2082 (i). In *Metropolitan Life Ins. Co. v. Ford*, 126 Ky. 49, 102 S. W. 876, 31 Ky. Law Rep. 513, it was held that, in the absence of proof that an insured knew of the rejection of his application for other insurance at the time he applied to an insurer, it will be presumed in an action on a policy issued by the latter that his answer in the application that applications for other insurance had not been rejected was true, and that the insurer has the burden of proving that the rejection was made known to the insured before he applied for the policy sued on.

If the applicant falsely stated that no policy of accident insurance had been canceled, the application making such statement a war-

ranty, the insurer under plea of general issue might show the fraud of such statement, and that it had canceled the policy during insured's life (*Wells v. Great Eastern Casualty Co.* [R. I.] 100 Atl. 395).

In *Langdeau v. John Hancock Mut. Life Ins. Co.*, 194 Mass. 56, 80 N. E. 452, 18 L. R. A. (N. S.) 1190, it was held that in an action on a policy, whether insured knew, or should have known at the time he represented that he had never been postponed or rejected, that a prior proposal for insurance had been unfavorably acted upon, was for the jury.

The admissibility of evidence of rejection of prior applications has been considered in several cases:

In *Kenny v. Bankers' Accident Ins. Co. of Des Moines*, 136 Iowa, 140, 113 N. W. 566, it was held that where insured stated, in an application for an accident policy, that no accident company had ever rejected his application or canceled his policy, evidence that he had been previously insured, and that on the expiration of his policy the association notified him that in case he desired to continue the insurance it would be at a new rate, and that he did not renew it, was not admissible to show falsity in such representation.

In *Spiegel v. Empire Life Ins. Co.* (Sup.) 96 N. Y. Supp. 201, it was held that where, in an action on a life policy, the sole defense was the untrue statement by assured by way of warranty that no proposal to insure his life had been declined, it was error to exclude an application to another company for insurance, subscribed in the name of the insured, though there was no evidence of the identity of the subscriber with the insured, identity of names being presumptively evidence of the identity of persons, and though the defense would not have been established without proof of failure to receive a policy on the application.

In *Provident Sav. Life Assur. Soc. v. Wayne's Adm'r*, 93 S. W. 1049, 29 Ky. Law Rep. 160, it was held that in an action on life policies, defended on the ground of misrepresentations by the assured as to rejections by other companies, evidence that he had been rejected by one company because the medical director regarded the application with disfavor because the agent was not the regular agent of the company was admissible, as tending to show the insured's belief as to whether he had been rejected in good faith.

Insured's inability to read and write is immaterial on question of binding effect of representations in application that he had not been rejected by any other life company, but should be considered in determining whether he had applied for insurance in any other

company (*American Temperance Life Ins. Ass'n of City of New York v. Solomon*, 233 Fed. 213, 147 C. C. A. 219).

The sufficiency of evidence was considered in *Supreme Lodge of the Fraternal Brotherhood v. Jones* (Tex. Civ. App.) 143 S. W. 247, and *Haughton v. Ætna Life Ins. Co.*, 42 Ind. App. 527, 85 N. E. 125, rehearing denied 42 Ind. App. 527, 85 N. E. 1050.

In *Langdeau v. John Hancock Mut. Life Ins. Co.*, 80 N. E. 452, 194 Mass. 56, 18 L. R. A. (N. S.) 1190, it was held that, where there was no direct proof that insured had been informed of a prior rejection, the court properly charged that, unless the jury found that he had constructive notice and was chargeable with such knowledge, such defense could not prevail.

In *Metropolitan Life Ins. Co. v. Ford*, 126 Ky. 49, 102 S. W. 876, 31 Ky. Law Rep. 513, it was held that where, in an action on a life policy, defended on the ground that insured had in his application falsely stated that applications for other insurance had not been rejected, the evidence showed that an application for other insurance had been rejected 15 days before the date of the application, but did not show that he had been notified of the rejection prior to the making of the application, an instruction that the representations in the application as to there having been no refusal of insurance did not prevent a recovery, unless insured had knowledge of such refusal when the application for the policy sued on was signed, properly submitted the issue.

15. EFFECT OF MISREPRESENTATION, BREACH OF WARRANTY, OR CONCEALMENT AS TO OTHER EXISTING INSURANCE

2083-2084. (a) Effect of false statements or concealment in general

2083 (a). In *Wyss-Thalman v. Maryland Casualty Co. of Baltimore* (C. C.) 193 Fed. 55, writ of error dismissed 193 Fed. 53, 113 C. C. A. 383, it was held that statements in schedule of warranties by assured in accident policy as to existence of other insurance were material.

In *Floyd v. Metropolitan Life Ins. Co. of New York*, 5 Boyce (Del.) 51, 90 Atl. 404, it was held that a false statement by an insured in his application for a life policy, to the effect that he was then carrying insurance in no other company, was a warranty, and vitiated the policy.

In *Bonewell v. North American Accident Ins. Co.*, 125 N. W. 59, 160 Mich. 137, it was held that an insurance company may make

the truthfulness of representations as to whether the applicant has previously received indemnity, warranties, whether they are material or not.

However, where it was not contended that accident policies were avoided by carrying of other insurance but only because schedule of warranties did not show that such other insurance was carried, representations as to carrying of other insurance are immaterial, and their falsity will not defeat an action on policies (*Stillman v. Ætna Life Ins. Co.* [D. C.] 240 Fed. 462).

2084-2086. (b) What constitutes false answer or concealment

2084 (b). In *Mutual Reserve Life Ins. Co. v. Dobler*, 137 Fed. 550, 70 C. C. A. 134, an application for life insurance requested insured to answer whether he then had any insurance on his life, which he answered, giving the name and amount of a life insurance policy, and the name of the company writing the same, and contained a further question, "Have you any other insurance?" which he answered, "None." It was held that such questions did not call for an answer as to other than life insurance.

In *Mutual Life Ins. Co. v. Ford*, 130 S. W. 769, 61 Tex. Civ. App. 412, writs of error denied 103 Tex. 522, 131 S. W. 406, it was said that, where there was no room for insured in a life policy to conclude from the question in the application for insurance as to other insurance that fraternal and accident insurance were not intended to be included, his failure to include them vitiated the policy, but, where he could reasonably conclude that such insurance was not intended, the omission did not render the contract void.

Where the application for accident policy required the applicant to say whether an accident policy had ever been canceled, it would not have been a misrepresentation to state that none had been canceled where one had been voluntarily surrendered; there being a distinction between cancellation and surrender (*Wells v. Great Eastern Casualty Co.* [R. I.] 100 Atl. 395).

2087-2088. (d) Insurance in mutual benefit associations

2087 (d). In *Mutual Life Ins. Co. v. Ford*, 103 Tex. 522, 131 S. W. 406, denying writs of error 61 Tex. Civ. App. 412, 130 S. W. 769, an application of an old line life insurance company requested information as to other insurance carried by the applicant, and made his answer thereto a warranty. He answered that he had been accepted for insurance in the same company for \$1,000 10-payment in-

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come policy, and was insured in other companies and associations as follows: "\$5,000 Equitable of New York and in no others." It was held that under the rule that the language of the application would be strictly construed against the insurance company, and, when the words admitted of two constructions, the one most favorable to the insured would be used to prevent a forfeiture, insured was entitled to assume that the question only called for other insurance in companies of a like kind as that to which the application was to be made, and that there was therefore no breach of warranty in his failure to disclose an accident policy and certificate in fraternal assessment orders and local societies.

2088-2089. (e) Pleading and practice

2088 (e). In *Prudential Life Ins. Co. of America v. Fusco's Adm'r*, 140 S. W. 566, 145 Ky. 378, certain industrial policies sued on, on the life of an infant, provided that they should be void if the insured, while under 22 years of age, had a total amount of industrial insurance at the time of his death exceeding \$460. It was held that an answer alleging that at the time of insured's death there were policies existing on her life amounting to \$738.90, without alleging that the total amount of industrial insurance exceeded \$460, was insufficient; the limitation relating entirely to industrial insurance.

In *Supreme Lodge K. P. v. Few*, 76 S. E. 91, 138 Ga. 778, it was held that in a suit on a life policy, where the pleadings and evidence tended to show that the application attached to the policy contained statements as to policies in other companies, and there was evidence to the contrary, it was error to direct a verdict for plaintiff.

The sufficiency of evidence was considered in *Monahan v. Metropolitan Life Ins. Co.*, 180 Ill. App. 390.

**16. EFFECT OF MISREPRESENTATION, BREACH OF WARRANTY, OR CONCEALMENT AS TO SPECIAL CIRCUMSTANCES
REGARDED AS AFFECTING THE RISK**

2090-2092. (a) In general

2090 (a). In *Coplin v. Woodmen of the World*, 62 South. 7, 105 Miss. 115, Ann. Cas. 1916D, 1295, it was held that where, because of the illiteracy of an applicant for insurance, his parents, and other members of his family, the family name was spelled in different ways, and the applicant was known by different given or Christian

names, a misstatement of his name in the application did not avoid the benefit certificate.

In *Everson v. General Accident Fire & Life Assur. Corp., Ltd.*, of Perth, Scotland, 88 N. E. 658, 202 Mass. 169, it was held that, where the schedule of warranties by insured is made up of printed partial assertions, followed by blanks to be filled in, they indicated interrogations, and neither affirmation nor negation could be predicated on a mere omission under such circumstances.

In *O'Brien v. Brotherhood of American Yeomen*, 150 N. W. 130, 183 Mich. 86, it was held that a question in the medical examination as to whether any member of the applicant's household was afflicted with consumption, or had been so affected within the last two years, included those who had died within the two-year period.

In *Morrow v. National Life Ass'n of Des Moines, Iowa*, 168 S. W. 881, 184 Mo. App. 308, it was held that there was no fraud in the procuring of a life policy made to a creditor because the debt owing to him is much less than the face of the policy; the application disclosing he was a creditor making no statement or inquiry as to the amount of the debt.

In *Falberg v. Continental Casualty Co.*, 195 Ill. App. 237, it was held that a false statement in an application for life insurance as to the applicant's name invalidates the contract.

Under an accident policy allowing \$60 a month in case of total disability and a principal sum of \$600 in case of death, a misrepresentation as to earning power affecting only the monthly allowance will not defeat recovery for death (*Miller v. National Casualty Co.*, 62 Pa. Super. Ct. 417).

2092-2093. (b) Financial standing of applicant

2092 (b). In *Heintz v. Continental Casualty Co.*, 105 N. Y. Supp. 519, 121 App. Div. 75, it was held that, where an application for accident insurance stated that the applicant had an income of a certain amount, the representation was a warranty, and, if untrue, the policy was not enforceable.

In *Ætna Life Ins. Co. v. Claypool*, 128 Ky. 43, 107 S. W. 325, 32 Ky. Law Rep. 856, under Ky. St. 1903, § 639, providing that all statements in an application for a policy shall be deemed representations, and not warranties, and that no misrepresentation, unless material or fraudulent, shall prevent recovery, it was held that a statement by insured in his application that his weekly earnings were more than they actually were was, under the policy as issued, no

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defense to a recovery for an accident resulting in the loss of his right hand; the statement as to weekly earnings having no reference to recovery for accidental loss of life or limb, but only to the question of weekly indemnity. This statement is repeated in a dictum in *Claypool v. Continental Casualty Co.*, 112 S. W. 835, 129 Ky. 682, arising out of the same facts.

In *Travelers' Ins. Co. v. Leibus*, 28 Ohio Cir. Ct. R. 700, it was held that a clause avoiding a policy of accident insurance for a false or incorrect statement of the weekly earnings of the assured is applicable only to the weekly indemnity to which the assured would be entitled in case of an injury which incapacitates him from following his vocation, and not to an injury resulting in death.

In *Pagel v. United States Casualty Co.*, 148 N. W. 878, 158 Wis. 278, it was held that, in view of St. 1913, § 4202m, the fact that insured's weekly earnings were less than the indemnity specified in an accident policy would not avoid it, though the policy stated that such earnings were in excess of all policies in force.

In *Everson v. General Accident, Fire & Life Assur. Corp., Limited*, of Perth, Scotland, 88 N. E. 658, 202 Mass. 169, it was held that a statement respecting the income of the insured, which appeared in a rider pasted on an accident policy, the heading of which was "Schedule of Warranties Made by the Insured on the Acceptance of This Policy," though not signed by him, the series of statements of which it was a part being in the first person, and giving information material to the acceptance of the risk, and at what amount and rate, was a warranty, and not a condition precedent.

2094-2095. (e) Questions of practice

2094 (e). In *Cornelius v. Central Acc. Ins. Co. of Pittsburgh*, 67 Atl. 840, 218 Pa. 532, it was held that where plaintiff, an attorney and insurance solicitor, procured accident insurance for himself under instructions not to take applications for policies providing for weekly indemnity greater than three-fourths of the weekly income of the insured, and it was shown that plaintiff's weekly income was sometimes greater and sometimes less than an amount sufficient to sustain his policy under this rule, an instruction that plaintiff was entitled to recover if he acted in good faith in taking out the insurance, without an intent to obtain overinsurance, otherwise not, was sufficiently favorable to defendant.

In *Everson v. General Accident Fire & Life Assur. Corp., Ltd.*, of Perth, Scotland, 88 N. E. 658, 202 Mass. 169, it was held that,

where the amount of plaintiff's income was left uncertain on the evidence, the questions as to the falsity of his statement respecting it, and his intent to mislead, were properly left to the jury, to determine whether a statement as to weekly income, if false, increased the risk.

In *McRaith v. Grand Lodge A. O. U. W.*, 126 N. W. 321, 149 Iowa, 148, it was held that where one applying for membership in a fraternal insurance order informed the members of the lodge that he had been a member of the order, and he was admitted as a suspended member on taking the obligation, without the ceremonies incident to the initiation of a new member, a finding that the order was not misled by the affirmation of the member made immediately before his admission that he had never been expelled or suspended from any lodge of the order was justified.

**17. EFFECT OF MISREPRESENTATION, BREACH OF WARRANTY,
OR CONCEALMENT, AS TO PHYSICAL CONDITION
AND HEALTH OF INSURED**

**2096-2098. (a) Materiality of facts and effect of false statement or
concealment in general**

2096 (a). The general rule is that statements relating to the health and physical condition of the applicant for life insurance are material to the risk, and, if false, avoid the policy.

Alexander v. Metropolitan Life Ins. Co., 64 S. E. 432, 150 N. C. 536; *Eminent Household of Columbian Woodmen v. Prater*, 103 Pac. 558, 24 Okl. 214, 23 L. R. A. (N. S.) 917, 20 Ann. Cas. 287; *Kelper v. Equitable Life Assur. Soc. of United States (C. C.)* 159 Fed. 206; *Satterlee v. Modern Brotherhood of America*, 106 N. W. 561, 15 N. D. 92; *Ætna Life Ins. Co. v. Crabtree*, 142 S. W. 690, 146 Ky. 368; *Healy v. Metropolitan Life Ins. Co.*, 37 App. D. C. 240; *Ætna Life Ins. Co. v. Crabtree*, 142 S. W. 690, 146 Ky. 368; *Kidder v. Supreme Commandery United Order of Golden Cross*, 78 N. E. 469, 192 Mass. 326; *National Protective Legion v. Allphin*, 133 S. W. 788, 141 Ky. 777; *Brisou v. Metropolitan Life Ins. Co. (Ky.)* 115 S. W. 785; *Feeney v. National Council of Knights and Ladies of Security*, 172 Ill. App. 51; *Kennedy v. Prudential Ins. Co. of America*, 177 Ill. App. 50; *Klein v. National Protective Legion*, 179 Ill. App. 605; *Supreme Ruling of Fraternal Mystic Circle v. Hansen (Tex. Civ. App.)* 161 S. W. 54; *Van Woert v. Modern Woodmen of America*, 151 N. W. 224, 29 N. D. 441; *Equitable Life Assur. Soc. of United States v. Kelper*, 165 Fed. 595, 91 C. C. A. 433; *Mudge v. Supreme Court, I. O. F.*, 112 N. W. 1130, 149 Mich. 467, 14 L. R. A. (N. S.) 279, 119 Am.

St. Rep. 686; *Maddox v. Southern Mut. Life Ins. Ass'n*, 65 S. E. 789, 6 Ga. App. 681; *Metropolitan Life Ins. Co. v. Schmidt*, 93 S. W. 1055, 29 Ky. Law Rep. 255; *Doll v. Equitable Life Assur. Soc. of the United States*, 138 Fed. 705, 71 C. C. A. 121; *Thompson v. Metropolitan Life Ins. Co.*, 113 N. Y. Supp. 225, 128 App. Div. 420, reversing 99 N. Y. Supp. 1006; *Carmichael v. John Hancock Mut. Life Ins. Co.*, 101 N. Y. Supp. 602, 116 App. Div. 291, reversing 49 Misc. Rep. 461, 97 N. Y. Supp. 976; *Metropolitan Life Ins. Co. v. Betz*, 99 S. W. 1140, 44 Tex. Civ. App. 557; *Smith v. Bankers' Life Ass'n*, 157 Ill. App. 236; *Murphy v. Metropolitan Life Ins. Co.*, 118 N. W. 355, 106 Minn. 112; *Peoria Life Ass'n v. Goodwin*, 134 Ill. App. 464; *Haapa v. Metropolitan Life Ins. Co.*, 114 N. W. 380, 150 Mich. 467, 16 L. R. A. (N. S.) 1165, 121 Am. St. Rep. 627; *National Annuity Ass'n v. McCall*, 146 S. W. 125, 103 Ark. 201, 49 L. R. A. (N. S.) 418; *Hoffman v. Metropolitan Life Ins. Co.*, 131 N. Y. Supp. 588, 147 App. Div. 893; *Grand Fraternity v. Keatley*, 88 Atl. 553, 4 Boyce (Del.) 308, reversing judgment 82 Atl. 294, 2 Boyce, 511; *Brotherhood of American Yeomen v. Fordham*, 180 S. W. 206, 120 Ark. 605; *Supreme Lodge of Modern American Fraternal Order v. Miller*, 110 N. E. 556, 60 Ind. App. 269; *Cunningham v. National Americans*, 185 S. W. 786, 123 Ark. 620; *Knights and Ladies of Security v. Considine*, 158 Pac. 282, 61 Colo. 474; *Sowiczki v. Modern Woodmen of America*, 158 N. W. 891, 192 Mich. 265; *Bednarek v. Brotherhood of American Yeomen*, 157 Pac. 884, 48 Utah, 67; *Hill v. Business Men's Accident Ass'n* (Mo. App.) 189 S. W. 587; *Woodmen of the World v. McHenry*, 73 South. 97, 197 Ala. 541; *Holloway v. Metropolitan Life Ins. Co.*, 154 N. Y. Supp. 194, 90 Misc. Rep. 697; *United States Annuity & Life Ins. Co. v. Peak* (Ark.) 195 S. W. 392; *Porter v. General Acc. Fire & Life Assur. Corp.*, 157 Pac. 825, 30 Cal. App. 198; *Life & Casualty Ins. Co. v. King*, 195 S. W. 585, 137 Tenn. 685; *Duff v. Prudential Ins. Co. of America* (N. J.) 101 Atl. 371; *Metropolitan Life Ins. Co. v. Jennings*, 101 Atl. 608, 130 Md. 622.

In some cases such statements are regarded as warranties, and therefore necessarily material.

Wilson v. Interstate Business Men's Accident Ass'n, 160 Iowa, 184, 140 N. W. 860; *The Homesteaders v. Briggs* (Tex. Civ. App.) 166 S. W. 95; *French v. Fidelity & Casualty Co. of New York*, 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011; *Valleroy v. Knights of Columbus*, 116 S. W. 1130, 135 Mo. App. 574; *Loehr v. Supreme Assembly of Equitable Fraternal Union*, 132 Wis. 436, 112 N. W. 441; *Hoagland v. Modern Woodmen of America*, 157 Mo. App. 15, 137 S. W. 900; *Crosse v. Supreme Lodge Knights and Ladies of Honor*, 98 N. E. 261, 254 Ill. 80, 45 L. R. A. (N. S.) 162.

In a number of cases such statements are regarded as not necessarily material, but an issue as to materiality may be made.

Modern Brotherhood of America v. Jordan (Tex. Civ. App.) 167 S. W. 794; *McCaffrey v. Knights & Ladies of Columbia*, 63 Atl. 189, 213 Pa. 609; *Yonda v. Royal Neighbors of America*, 148 N. W. 926, 96 Neb. 730; *Ætna Life Ins. Co. v. Conway*, 75 S. E. 915, 11 Ga. App. 557; *Ætna Life Ins. Co. v. Howell*, 107 S. W. 294, 32 Ky. Law Rep. 935; *Davis v. Catholic Order of Foresters*, 165 Ill. App. 137; *Mutual Life Ins. Co. v. Robinson*, 115 Md. 408, 80 Atl. 1085; *Roedel v. John Hancock Mut. Life Ins. Co.*, 176 Mo. App. 584, 160 S. W. 44; *Fishblate v. Fidelity & Casualty Co. of New York*, 53 S. E. 354, 140 N. C. 589; *Fidelity Mut. Life Ins. Co. v. Elmore*, 111 Miss. 137, 71 South. 305.

In some cases the conclusion seems to be that as statements as to health must, in the very nature of things, rest upon the knowledge and belief of the applicant, a false statement will not avoid the policy unless intentionally false.

Metropolitan Life Ins. Co. v. Johnson, 105 Ark. 101, 150 S. W. 393; *Pelican v. Mutual Life Ins. Co. of New York*, 44 Mont. 277, 119 Pac. 778; *Minnesota Mut. Life Ins. Co. v. Link*, 82 N. E. 637, 230 Ill. 273; *Diehl v. Mutual Life Ins. Co. of New York*, 176 Ill. App. 462.

Where the statements in a policy relating to the physical condition of insured were prepared by the insurer for its own protection, the statements must be construed in the most favorable light permissible for the benefit of insured or the beneficiary.

Sargent v. Modern Brotherhood of America, 148 Iowa, 600, 127 N. W. 52; *French v. Fidelity & Casualty Co. of New York*, 135 Wis. 250, 115 N. W. 869, 17 L. R. A. (N. S.) 1011; *Pelican v. Mutual Life Ins. Co. of New York*, 44 Mont. 277, 119 Pac. 778 (citing statute); *Great Eastern Casualty Co. v. Smith* (Tex. Civ. App.) 174 S. W. 687 (leg amputated at the knee).

In *Minnesota Mut. Life Ins. Co. v. Link*, 131 Ill. App. 89; judgment affirmed 82 N. E. 637, 230 Ill. 273, an applicant for life insurance was asked in the application if at any time he had suffered from any of some 60 listed diseases, among which were chronic cough and bronchitis, to which he answered "No." At the end of this list was the statement: "Having carefully read the foregoing questions, I declare that I have never had any of the diseases or any other serious ailment, except pneumonia." The applicant then signed a statement that he warranted the above

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statements to be true, and, if they were not true, the policy should be void. It was held that the questions and answers were representations and not warranties, and that the answer made by the insured with respect to ailments which had been suffered by him in the past was not an absolute one, but was limited by its express terms.

In *Knights of Maccabees of the World v. Hunter*, 143 S. W. 359, 57 Tex. Civ. App. 115, it was held, reversing 103 Tex. 612, 132 S. W. 116, that a finding that insured "had ulcer of the rectum" was not necessarily inconsistent with his answer to a question in his application for a benefit certificate as to whether he had ever had piles, by stating he had, and gave the details of the attack, including its date, duration, and results, and stating that he had had an operation therefor.

2098-2099. (b) Same—Modifications of rule

2098 (b). In *Roe v. National Life Ins. Ass'n*, 137 Iowa, 696, 115 N. W. 500, 17 L. R. A. (N. S.) 1144, it was held that misstatements in an application for life insurance as to applicant's health do not defeat recovery on the policy, where they did not mislead the medical examiner, and, if the answers had been correct, the examiner's report recommending the risk would not have been different.

In *Roe v. National Life Ins. Ass'n*, 137 Iowa, 696, 115 N. W. 500, 17 L. R. A. (N. S.) 1144, it was held that under Code, § 1812, estopping life insurers to defend an action on a policy on the ground that insured was not in the condition of health required by the policy when it was delivered, where insurer's medical examiner has recommended the risk, unless the examiner's report was procured by insured's fraud or deceit, to constitute such fraud or deceit there must have been an intent to deceive, and the examiner must have relied on false statements or representations made by insured, or been misled by the concealment of facts which good faith required him to disclose.

Under the Missouri statute (Rev. St. 1909, § 6937), providing that no misrepresentation shall render a policy void, unless the matter misrepresented actually contributed to the death of the insured, misrepresentations as to the health of insured do not avoid the policy, unless such ill health contributed to the death.

Salts v. Prudential Ins. Co., 140 Mo. App. 142, 120 S. W. 714; *Frazier v. Metropolitan Life Ins. Co.*, 161 Mo. App. 709, 141 S. W. 936.

2100-2101. (c) Same—Statements on application for reinstatement

2100 (c). In *Cole v. Mutual Life Ins. Co. of New York*, 56 South. 645, 129 La. 704, Ann. Cas. 1913B, 748, it was held that a statement by an applicant for reinstatement of life insurance that his health has remained good and unimpaired since his examination under the original application did not amount to a warranty, but was a mere representation, needing to be true only to his best knowledge and belief.

A policy reinstated after lapse, upon the false statement of the insured that he was suffering from no disease and had consulted no physician for a year previous, is unenforceable.

New York Life Ins. Co. v. Franklin, 118 Va. 418, 87 S. E. 584; *Thorn-er v. John Hancock Mut. Life Ins. Co.*, 149 N. Y. Supp. 845, 164 App. Div. 34.

In *Mutual Life Ins. Co. of New York v. Allen*, 174 Ala. 511, 56 South. 568, under a provision of Code 1907, § 4572, that no misrepresentation in a policy of life insurance, or in a negotiation of a contract for life insurance, or in the application therefor, shall avoid the policy, unless made with actual intent to deceive, or unless the matter misrepresented increases the risk of loss, in an action on a policy which had been renewed by the insured after a lapse, the defendant pleaded that the insured, on his application for reinstatement, represented that his health was good and unimpaired, but that he was not in good health, but was then suffering from a disease of the heart, which increased the risk of loss. The court held this a good defense, since, as the statute is in the alternative, the showing of an increase of the risk of loss, without a showing that the misrepresentation was made with actual intent to deceive, is sufficient.

2101-2104. (d) Necessity and sufficiency of disclosure

2101 (d). Inquiries put to the applicant must be deemed to relate to matters which affect the general health and continuance of life, and not to mere occasional and temporary physical disturbances, the result of accidental causes, to which all men are more or less subject. But in regard to diseases of well-marked symptoms, alarming in character, which all well-informed persons regard as affecting the general health and threatening the continuance of life from the danger of their recurrence, the applicant is bound to state the exact truth.

Thomas v. Modern Brotherhood of America, 25 S. D. 632, 127 N. W. 572; *Royal Neighbors of America v. Bratcher* (Tex. Civ.

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App.) 151 S. W. 885; *Modern Woodmen of America v. Owens*, 60 Tex. Civ. App. 398, 130 S. W. 858; *United States Annuity & Life Ins. Co. v. Peak*, 122 Ark. 58, 182 S. W. 505; *Gardner v. North State Mut. Life Ins. Co.*, 79 S. E. 806, 163 N. C. 367, 48 L. R. A. (N. S.) 714, Ann. Cas. 1915B, 652; *Loehr v. Supreme Assembly of Equitable Fraternal Union*, 132 Wis. 436, 112 N. W. 441; *Talley v. Metropolitan Life Ins. Co.*, 60 S. E. 936, 111 Va. 778.

2102 (d). An applicant for life insurance is bound to disclose such changes in his physical condition pending the negotiation as would influence the insurer's judgment as to advisability of accepting risk (*Security Life Ins. Co. of America v. Booms*, 159 Pac. 1000, 31 Cal. App. 119).

In *Merriman v. Grand Lodge Degree of Honor*, 77 Neb. 544, 110 N. W. 302, 8 L. R. A. (N. S.) 983, 124 Am. St. Rep. 867, 15 Ann. Cas. 124, however, it was held that, where a married woman is an applicant for life insurance in a company that issues policies on the lives of married women, she is not required to inform the company of evidence of pregnancy after her physical examination and application.

2103 (d). The insurer cannot defeat recovery on the ground of a material false representation that the insured had not had a certain disease, when, on the examination, she described to the insurer's physician her symptoms and treatment, since such information was sufficient to indicate to a physician that she had had the disease (*Weisguth v. Supreme Tribe of Ben Hur*, 112 N. E. 350, 272 Ill. 541, affirming 194 Ill. App. 17). Similarly, where insured stated that he had a certain infirmity, the insurance company was put on inquiry; it not being expected that the answers in the application should be more than general.

Paulhamus v. Security Life & Annuity Co. (C. C.) 163 Fed. 554; *Peterson v. Manhattan Life Ins. Co.*, 91 N. E. 466, 244 Ill. 329, 18 Ann. Cas. 96, reversing 115 Ill. App. 421; *Fidelity Mut. Life Ins. Co. v. Miazza*, 93 Miss. 422, 48 South. 1017.

In *Mutual Life Ins. Co. of New York v. Crenshaw* (Tex. Civ. App.) 116 S. W. 375, it was held that, applicant for life insurance having suffered but one abortion, her answer "No" to the question whether she had suffered "abortions" was not false.

In *Sweeney v. Life Ass'n of America*, 152 Ill. App. 173, it was held that "this year," in the question "Has your weight changed this year?" contained in an application for insurance, means one year past, and not the preceding months of the then calendar year.

Failure to complete a printed statement in application for life policy that insured had not had specified diseases, "except ———," amounted to a statement that he had not had such diseases (*Guar-raia v. Metropolitan Life Ins. Co.* [N. J.] 101 Atl. 298).

2105-2108. (f) Knowledge and intent of applicant

2105 (f). If an applicant for insurance warrants the truth of answers made by him relative to his health, and they are untrue as to some disease material to the risk, it is a breach of warranty, whether he knew they were untrue or not.

National Annuity Ass'n v. McCall, 146 S. W. 125, 103 Ark. 201, 48 L. R. A. (N. S.) 418; *Heubner v. Metropolitan Life Ins. Co.*, 146 Ill. App. 282; *Supreme Lodge Knights and Ladies of Honor v. Payne*, 108 S. W. 1160, 101 Tex. 449, 15 L. R. A. (N. S.) 1277.

Where, however, the applicant for life insurance certifies that his health is good according to the best of his knowledge, a recovery may be had on his death, if he had reason to believe that he was in good health, though this was not in fact his condition.

Smith v. Prudential Ins. Co. of America, 83 N. J. Law, 719, 85 Atl. 190, 43 L. R. A. (N. S.) 431; *Blackman v. United States Casualty Co.*, 103 S. W. 784, 117 Tenn. 578; *Stanyan v. Security Mut. Life Ins. Co.*, 99 Atl. 417, L. R. A. 1917C, 350.

In *Ætna Life Ins. Co. v. Howell*, 107 S. W. 294, 32 Ky. Law Rep. 935, it was held that an applicant for health insurance, induced by the agent taking the application to sign it without knowing that it contains a representation, or without intending to represent, that he has no local or constitutional disease, is not bound thereby.

In *Cunningham v. Modern Brotherhood of America*, 148 N. W. 918, 96 Neb. 827, it was held that an incorrect answer in an application for life insurance, as to matters of opinion will not avoid the policy, if made in good faith, without intention to deceive.

In *Kennedy v. Prudential Ins. Co., of America*, 177 Ill. App. 50, it was held that a negative answer to a question, which is part of the contract of insurance, as to whether the applicant had, so far as she knew, ever had any serious illness, was made with an intention to deceive, where applicant had left a hospital after an operation for appendicitis only ten days before the application was made.

So, in *Metropolitan Life Ins. Co. v. Schmidt*, 93 S. W. 1055, 29 Ky. Law Rep. 255, an applicant for a life policy stated in his ap-

plication that he had never had excessive urination, that he had no disease of the urinary organs, and that his medical attendant had treated him 16 months before for constipation and cold. Prior to the application two physicians had informed him that he had diabetes, and when consulting them for treatment, he stated that he had excessive urination. It was held that the statements in the application were untrue, as a matter of law, precluding recovery on the policy, though the applicant did not believe that he had diabetes.

2108. (g) Same—Latent diseases

2108 (g). Insured's failure to disclose the existence of a latent defect, concerning which, from the nature of things, he could have no exact information, will not invalidate the policy, where he discloses the condition of his health as known to him.

Feinberg v. New York Life Ins. Co., 256 Pa. 61, 100 Atl. 538; *Greenwood v. Royal Neighbors of America*, 118 Va. 329, 87 S. E. 581; *Suravitz v. Prudential Ins. Co. of America*, 91 Atl. 495, 244 Pa. 582, L. R. A. 1915A, 273; *Blackman v. United States Casualty Co.*, 108 S. W. 784, 117 Tenn. 578.

2108-2110. (h) Same—Facts which applicant is presumed to know

2108 (h). If facts are stated which the insurer must, from the nature of the facts, know are not stated as absolutely true within the personal knowledge of the insured, the policy should not be avoided merely because the statement turns out afterwards to be in point of fact untrue, if it was made in perfect good faith and in the full belief that it was true.

Rupert v. Supreme Court of United Order of Foresters, 102 N. W. 715, 94 Minn. 293; *Collins v. Catholic Order of Foresters*, 88 N. E. 87, 43 Ind. App. 549; *Owen v. Metropolitan Life Ins. Co.*, 74 N. J. Law, 770, 67 Atl. 25, 122 Am. St. Rep. 413; *Lakka v. Modern Brotherhood of America*, 163 Iowa, 159, 143 N. W. 513, 49 L. R. A. (N. S.) 902; *Brotherhood of Railroad Trainmen v. Swearingen*, 161 Ky. 685, 171 S. W. 455.

In *Collins v. Catholic Order of Foresters*, 43 Ind. App. 549, 88 N. E. 87, it was held that statements by the insured in his application for life insurance concerning matters of fact which are presumably within his knowledge are warranties; but statements as to matters of fact, concerning which the insurer should know that the applicant could not have certain knowledge, and such as are necessarily opinions, are to be regarded as warranting only his honest belief in their truth and his honest opinion. A similar po-

sition is taken in *Rasicot v. Royal Neighbors of America*, 18 Idaho, 85, 108 Pac. 1048, 29 L. R. A. (N. S.) 433, 138 Am. St. Rep. 180.

In *Kidder v. Supreme Commandery United Order of Golden Cross*, 78 N. E. 469, 192 Mass. 326, it was held that, when considering and answering questions involving insured's physical history in an application for life insurance, insured will be presumed to have been cognizant of her physical history within the period to which the inquiries were confined. A somewhat similar case is *Talley v. Metropolitan Life Ins. Co.*, 69 S. E. 936, 111 Va. 778, where insured, in response to questions, stated that he had had some minor ailments, when in fact he had then been informed that he was suffering from tuberculosis, from which he four months later died. It was held that the applicant in his answers had concealed material facts, which were tantamount to a fraud on the company and avoided the policy.

In *Royal Neighbors of America v. Wallace*, 102 N. W. 1020, 73 Neb. 409, it was held, reversing 5 Neb. (Unof.) 519, 99 N. W. 256, that, if an applicant has knowledge of facts furnishing reason to believe that he is afflicted with a fatal disease when he makes his application, his statement therein that he is in good health will be presumed to be fraudulent.

2110-2112. (i) What is meant by "good health" or "sound health"

2110 (i). Illness, when applied to the warranty of an insured in a life policy that he was of sound health, means a disease of such a character as to affect the general soundness of the system, and not a mere temporary indisposition which does not undermine and weaken the constitution.

Scofield's Adm'x v. Metropolitan Life Ins. Co., 64 Atl. 1107, 79 Vt. 161, 8 Ann. Cas. 1152; *Clover v. Modern Woodmen of America*, 142 Ill. App. 276; *Horne v. John Hancock Mut. Life Ins. Co.*, 53 Pa. Super. Ct. 330; *French v. Fidelity & Casualty Co. of New York*, 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011; *Great Eastern Casualty Co. v. Smith* (Tex. Civ. App.) 174 S. W. 687 (leg amputated at the knee); *Court of Honor v. Dinger*, 77 N. E. 557, 221 Ill. 176, affirming judgment (1905) 123 Ill. App. 406; *Cady v. Fidelity & Casualty Co. of New York*, 134 Wis. 822, 113 N. W. 967, 17 L. R. A. (N. S.) 260 (a local affection); *Hines v. New England Casualty Co.*, 172 N. C. 225, 90 S. E. 131, L. R. A. 1917B, 744 (statutory); *Metropolitan Casualty Ins. Co. v. Cato*, 113 Miss. 283, 74 South. 114; *National Council Knights and Ladies of Security v. Owen* (Okla.) 161 Pac. 178; *Sovereign*

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Camp of Woodmen of the World v. Jackson, 157 Pac. 92, L. R. A. 1916F, 166; Csizik v. Verhovay Sick Benefit Ass'n, 60 Pa. Super. Ct. 466.

Where a married woman is the holder of a life insurance policy, it is not a false representation for her to sign a certificate that she is in sound bodily health, though she be pregnant, if the certificate is otherwise true.

McCaffrey v. Knights and Ladies of Columbla, 63 Atl. 189, 213 Pa. 609; Merriman v. Grand Lodge Degree of Honor, 77 Neb. 544, 110 N. W. 302, 8 L. R. A. (N. S.) 983, 124 Am. St. Rep. 867, 15 Ann. Cas. 124; Rasicot v. Royal Neighbors of America, 18 Idaho, 85, 108 Pac. 1048, 29 L. R. A. (N. S.) 433, 138 Am. St. Rep. 180.

In Murphy v. Metropolitan Life Ins. Co., 118 N. W. 355, 106 Minn. 112, it was stated that the term "sound health," as used in a life insurance policy, providing that no obligation is assumed unless assured is in sound health, means an absence of any disease that has a direct tendency to shorten life.

In Mays v. New Amsterdam Casualty Co., 40 App. D. C. 249, 46 L. R. A. (N. S.) 1108, it was held that a statement printed in an application for accident or disability insurance, to the effect that the applicant is "in sound condition, mentally and physically," does not require the applicant to do more than state his honest belief that he is not suffering to an appreciable degree with any bodily ill.

2112-2113. (j) What is meant by "serious illness"

2112 (j). Serious illness has been construed to mean such an illness as has, or ordinarily does have, a permanent detrimental effect on the system, or renders the risk unusually hazardous.

Massachusetts Bonding & Insurance Co. v. Duncan, 179 S. W. 472, 166 Ky. 515; Schas v. Equitable Life Assur. Society of United States, 170 N. C. 420, 87 S. E. 222; Eminent Household of Columblan Woodmen v. Prater, 24 Okl. 214, 108 Pac. 558, 23 L. R. A. (N. S.) 917, 20 Ann. Cas. 287; Kelper v. Equitable Life Assur. Soc. of United States (C. C.) 159 Fed. 206; Poole v. Grand Circle, Women of Woodcraft, 18 Cal. App. 457, 123 Pac. 349; Metropolitan Life Ins. Co. v. Little, 149 S. W. 998, 149 Ky. 717.

In Equitable Life Assur. Society of United States v. Keiper, 165 Fed. 595, 91 C. C. A. 433, it was held, reversing (C. C.) 159 Fed. 206, that where insured suffered from acute pains in the abdomen, and was for some time in a state of collapse, was attended by two physicians and a trained nurse, and recovered after five or six

weeks, which sickness followed a chronic stomach trouble with which on several occasions he had been ill. Such sickness was a "serious illness."

2113-2117. (k) Slight or temporary ailments

2113 (k). A general question in an application for insurance, calling for information concerning former illnesses, does not require the disclosure of an illness of a trifling, temporary, or unimportant nature, as such does not affect the character of the risk.

Gruber v. German Roman Catholic Aid Ass'n of Minnesota, 113 Minn. 340, 129 N. W. 581; *Peterson v. Manhattan Life Ins. Co.*, 91 N. E. 466, 244 Ill. 329, 18 Ann. Cas. 96; *Royal Neighbors of America v. Bratcher* (Tex. Civ. App.) 151 S. W. 885; *Ætna Life Ins. Co. of Hartford, Conn., v. Millar*, 113 Md. 686, 78 Atl. 483; *Rupert v. Supreme Court of United Order of Foresters*, 102 N. W. 715, 94 Minn. 293; *Des Moines Life Ins. Co. v. Clay*, 116 S. W. 232, 89 Ark. 230; *Mutual Life Ins. Co. of New York v. Morgan*, 39 Okl. 205, 135 Pac. 279; *Goff v. Mutual Life Ins. Co. of New York*, 59 South. 28, 131 La. 98; *Modern Woodmen of America v. Wilson*, 107 N. W. 568, 76 Neb. 344; *Smith v. Travelers' Ins. Co.*, 135 N. Y. Supp. 18, 76 Misc. Rep. 441 (influenza and tonsillitis); *United States Health & Accident Ins. Co. v. Bennett's Adm'r*, 105 S. W. 433, 32 Ky. Law Rep. 235 (slight attacks of piles); *Cessna v. United States Life Endowment Co.*, 152 Ill. App. 653 (a bad cold); *Hoeland v. Western Union Life Ins. Co. of Spokane*, 53 Wash. 100, 107 Pac. 866 (headaches); *Sargent v. Modern Brotherhood of America*, 148 Iowa, 600, 127 N. W. 52 (tonsillitis and stomach trouble, both of temporary character; also occasional headaches).

In *Beard v. Royal Neighbors of America*, 99 Pac. 83, 53 Or. 102, 19 L. R. A. (N. S.) 798, 17 Ann. Cas. 1199, it was held that, where the truth of the answers in an application for a benefit certificate are made a condition precedent to its validity, untrue answers to questions in the application as to whether applicant had consulted a physician, and had had la grippe, avoid the certificate, though the cause of the applicant's death may have had no connection with la grippe, and it may have been a very light attack.

2117-2119. (l) Existence of diseases in general

2117 (l). In *Thomas v. Modern Brotherhood of America*, 25 S. D. 632, 127 N. W. 572, it was held that the question relating to sickness within seven years referred to sickness other than that resulting from a miscarriage, so that having had no other illness

than that resulting from the miscarriage her answer to the question was true.

In *Peterson v. Manhattan Life Ins. Co.*, 91 N. E. 466, 244 Ill. 329, 18 Ann. Cas. 96, reversing 115 Ill. App. 421, it was held that where an applicant for insurance answered, "No," to a question in his application: "Have you ever had rheumatism in any form? Number of attacks, dates, duration, parts affected. State also whether there were heart complications"—the applicant thereby warranted that he did not have rheumatism in any form, which involved heart complications, and evidence that he had muscular rheumatism, but with no heart complications, did not show a breach of warranty.

In *Hilts v. United States Casualty Co.*, 176 Mo. App. 635, 159 S. W. 771, it was held that, where a policy insured against a hernia requiring a surgical operation, a predisposition to hernia or a weakening of the inguinal ring causing the hernia to subsequently develop was not a breach of a warranty that insured was free from any functional or organic disease, mental or physical disorder, defect, etc.

In *French v. Fidelity & Casualty Co. of New York*, 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011, it was held that a warranty in an accident policy that insured had not had and was not suffering from bronchitis must be given a reasonable interpretation in arriving at the intention of the parties; and, though bronchitis as a medical term is defined as inflammation, acute or chronic, of the bronchial tubes, or any part of them, it must be used in its limited sense as meaning a chronic disease which will not yield readily to treatment, and which tends to impair the health and strength of insured, and does not include an acute attack from which he had fully recovered at the time the policy was accepted.

In *Columbia Life Ins. Co. v. Tousey*, 153 S. W. 767, 152 Ky. 447, it was held that a statement in the application, made January 28, 1910, that insured was in good health was not falsified by proof that in the middle of April following he was suffering from nephritis, from which he died in December following.

In *Green v. National Annuity Ass'n*, 135 Pac. 586, 90 Kan. 523, where an applicant for a benefit certificate stated in his application, in answer to whether he had had any disease within five years, that he had uræmia about a year previous, when in fact it had been but seven months previous, it was held, that such mis-

statement did not invalidate his certificate. It was said in the same case that a statement in an application for a benefit certificate that insured had suffered from uræmia, but also that he had never been unconscious, was sufficient to charge the insurer with knowledge that he was rendered unconscious thereby, since unconsciousness is a usual incident of this disease.

In *McEwen v. New York Life Ins. Co.*, 139 Pac. 242, 23 Cal. App. 694, it was held that representations that the only illness or accident since childhood was one attack of typhoid pneumonia was not substantially true, where applicant had had a serious accident totally disabling him for four months, and partially disabling him for a longer period.

In *Doll v. Equitable Life Assur. Soc.*, 138 Fed. 705, 71 C. C. A. 121, it was held that, where applicant within two years had repeated profuse hemorrhages from the stomach for nearly a week, and was treated by a physician for 30 days, who testified that the illness was serious, there was a breach of the warranty that applicant had had no serious illness within two years prior to the date of the application.

In *Kennedy v. Prudential Ins. Co. of America*, 177 Ill. App. 50, it was held that a false answer in the application made a part of the policy as to whether the insured had, so far as she knew, ever had any serious illness, and fraudulent answers to questions of the medical examiner concerning whether she ever had had appendicitis or had had an operation, are available in defense in an action on the policy which is not incontestable at the time of the death of the insured.

2120-2121. (n) Diseases of the brain—Nervous or mental diseases

2120 (n). In *Mudge v. Supreme Court I. O. F.*, 112 N. W. 1130, 149 Mich. 467, 14 L. R. A. (N. S.) 279, 119 Am. St. Rep. 686, it was held that an intentionally false answer in his medical examination by an applicant for a benefit certificate to the question, "Have you ever had the disease of insanity?" defeats recovery on the certificate, unless insurer is estopped to assert such defense. On the other hand, the answer, "None," to a question in an application for insurance, "Have you had insanity * * * or any other disorder of the brain or nervous system" is not false, though the evidence showed that the applicant had complained of dizziness and deafness in connection with a perforated eardrum (*Ideal Electric Co. v. Penn Mutual Life Ins. Co.*, 189 Ill. App. 331).

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A statement by insured that he did not have fits or convulsions, when in fact he was an epileptic, was material (*Westphall v. Metropolitan Life Ins. Co.*, 27 Cal. App. 734, 151 Pac. 159).

2121-2122. (o) Diseases of the respiratory organs—Consumption

2121 (o). In *Supreme Lodge K. P. v. Bradley*, 132 S. W. 547, 141 Ky. 334, it was held, reversing (Ky.) 117 S. W. 275 that applicant's statement that he had not been affected with tuberculosis was false on material matters, where physicians had told him, 14 months before, that he had tuberculosis and must seek another climate. The insurer was held not liable.

In *Collins v. Catholic Order of Foresters*, 43 Ind. App. 549, 88 N. E. 87, it was held that answers to interrogatories with reference to habitual coughing are to be regarded as warranties.

So where an applicant for insurance states in her application that she had never had pneumonia, while the evidence shows that four months before the date of the application a physician had treated her for pneumonia and that she had pneumonia, such false answers are material misrepresentations which render the policy void (*Podlesak v. Royal Neighbors of America*, 192 Ill. App. 73).

In *Talley v. Metropolitan Life Ins. Co.*, 69 S. E. 936, 111 Va. 778, an applicant for life insurance was asked at his examination, July 1, 1907, the following question: "Any disease of the chest or lungs?" and answered, "Yes," and was asked to "give full particulars of every illness you have had since childhood, and name of every physician who has ever attended you or prescribed for you," in answer to which question the applicant stated that in November, 1906, he had a mild attack of urethritis, without complications, which lasted seven days, when he was attended by a physician named; that in December, 1905, he had a mild attack of bronchitis, without complications, lasting three days, in which he had been attended by no physician. Upon this application and an examination by the insurer, a policy for \$1,000 was issued to the plaintiff as beneficiary, and the insured died four months thereafter of tuberculosis. In a suit on the policy, there was evidence showing that the insured was attended by two physicians in April and May, 1907, by one of them for a cold; that in June, 1907, before application for the policy in question, the insured consulted a physician and complained of feeling bad, having a cough, fever, loss of appetite and of energy; and that this physician secured a sample of sputum, which he examined, finding therein the germs of tuberculosis, the same examination

being made by another physician showing the same effect, which was communicated to the insured; and that at about the time the policy was delivered the insured was in a sanatorium for treatment as a consumptive. It was held that the applicant in his answers had concealed material facts which were tantamount to a fraud on the company, and avoided the policy.

In the same case it is also stated that the question, "Give full particulars of every illness you have had since childhood, and the name of every physician who has ever attended you or prescribed for you," comprehended the first, and called for particulars under the former categorical answer, and was a sufficient prosecution of the inquiry upon which the insurer was put by the applicant's answer to the former question, and that the applicant's failure to communicate to the insured under this last question the facts material to the risks which were known to him and which would have caused his rejection avoided the policy.

The Louisiana statutes were dealt with in two cases. In *Bertrand v. Franklin Life Ins. Co. of Illinois*, 44 South. 186, 119 La. 423, it was held that where, in an application for life insurance, assured expressly warrants the truth of the answers made to the medical examiner, and it is stipulated that the policy shall be avoided if any answer be untrue, the contract is the law of the case, and the policy is forfeited, under Acts 1906, p. 86, No. 52, where it is proved that the assured answered untruly that she had never had a chronic or persistent cough. In *Hanmore v. Metropolitan Life Ins. Co.*, 137 La. 137, 68 South. 385, a life insurance policy was held void pursuant to a warranty expressed in it, where the applicant had pulmonary disease prior to his examination; Act No. 97 of 1908, not applying where the applicant was examined by the insurer's physicians prior to issuance of the policy.

2122-2124. (p) Same—Spitting of blood

2122 (p). In *Collins v. Catholic Order of Foresters*, 43 Ind. App. 549, 88 N. E. 87, it was held that answers to interrogatories with reference to the spitting of blood are to be regarded as warranties. In *Eminent Household of Columbian Woodmen v. Prater*, 24 Okl. 214, 103 Pac. 558, 23 L. R. A. (N. S.) 917, 20 Ann. Cas. 287, it was held that the term "spitting or coughing of blood," as used in a question by a medical examiner to an applicant for life insurance, means the disorder so called, whether the blood comes from the lungs or the stomach.

**18. PLEADING AND PRACTICE AS TO MATTERS RELATING TO
HEALTH OF INSURED**

**2124-2126. (a) Pleading misrepresentation, breach of warranty, or
concealment**

2124 (a). In *Empire Life Ins. Co. v. Gee*, 171 Ala. 435, 55 South. 166, it was held that a plea, in an action on a life policy, which avers a fraudulent representation made in the negotiation for the policy that insured was in perfect health and safely insurable, and that insured was not in perfect health and safely insurable, was insufficient, for failing to state in what particular the representation was false; but an allegation that insured was then suffering from a disease of the aorta, and that the disease increased the risk of loss, was sufficient.

In *Cunningham v. Royal Neighbors of America*, 24 S. D. 489, 124 N. W. 434, 140 Am. St. Rep. 793, it was held that an answer not showing facts from which there can be no other deduction than that of fraud is insufficient, where there is no express allegation that insured knew that her health was not good when she received her benefit certificate to admit proof to establish fraud under Civ. Code, § 731, estopping a life insurance company to set up in defense to a policy that insured was not in good health at the issuing of the policy, where the medical examiner has issued a certificate of health, except where the policy is procured by fraud.

In *McCaffrey v. Knights and Ladies of Columbia*, 63 Atl. 189, 213 Pa. 609, the constitution and by-laws of the association provided that married women might be members, and a condition on the back of the certificate showed clearly that the association anticipated the probability of such a member becoming pregnant during the life of the policy. The association, in its affidavit of defense, alleged that deceased falsely stated that she was in good health at the time of the application and was not pregnant, and alleged that she was, and that a few months afterwards she died from the effects of childbirth. The affidavit merely stated that the statement of the applicant was material to the risk, but did not show in what manner this was the case, or that the association would have refused the risk if it had known the truth. It was held that a judgment for want of sufficient affidavit of defense was not error.

2126-2127. (b) Presumptions and burden of proof

2126 (b). Where insurer pleads that certain policies sued on were avoided by material misrepresentations of insured as to his health, the burden of proving the falsity of such statements is on the defendant.

Paquette v. Prudential Ins. Co., 79 N. E. 250, 198 Mass. 215; *Peck v. Washington Life Ins. Co.*, 74 N. E. 1122, 181 N. Y. 585, affirming 87 N. Y. Supp. 210, 91 App. Div. 597; *Roedel v. John Hancock Mut. Life Ins. Co.*, 176 Mo. App. 584, 160 S. W. 44; *Johnson v. Supreme Court of Independent Order of Foresters*, 175 Ill. App. 554; *Cole v. Mutual Life Ins. Co. of New York*, 56 South. 645, 129 La. 704, Ann. Cas. 1913B, 748; *Turner v. American Casualty Co.*, 69 Wash. 154, 124 Pac. 486 (under the pleadings); *Bathe v. Metropolitan Life Ins. Co.*, 152 Mo. App. 87, 132 S. W. 743; *Warren v. New York Life Ins. Co. (Mo. App.)* 182 S. W. 96.

In *Bathe v. Metropolitan Life Ins. Co.*, 152 Mo. App. 87, 132 S. W. 743, it was held that where, in an action on a life policy, void if insured had had pulmonary disease before the issuance of the policy, insurer alleged that insured had tuberculosis at the time and was not in sound health, and the beneficiary, the husband of insured, testified that he first discovered that his wife had tuberculosis subsequent to the issuance of the policy, and that she died of quick consumption, and he had no peculiar knowledge as to the health of insured at the time of the issuance of the policy, it was not error to require insurer to establish the truth of its answer as against the objection that the proof lay peculiarly within the knowledge of the beneficiary.

In *Pelican v. Mutual Life Ins. Co. of New York*, 44 Mont. 277, 119 Pac. 778, an application for a life policy provided that it should not take effect until the first premium had been paid, during insured's good health, and unless the policy should be issued during insured's good health, except in case a binding receipt should be issued as subsequently provided. It was admitted that the first premium had been paid and retained, and a copy of the application attached to the policy recited that a binding receipt had been issued by defendant's solicitor on completion of the medical examination. It was held that plaintiff, in order to establish a prima facie case, need not prove that insured was in good health at the time the policy was issued; the burden of proving that the policy was delivered when insured was not in good health being on the defendant, as provided by Rev. Codes, § 7972. It was stated in the same case that where defendant refused to pay a policy because of alleged misrep-

representations concerning insured's health, the burden was upon it to show not only that the representations were untrue, but that they were made with intent to conceal the condition of insured's health, and that defendant would not have issued the policy but for the fraud so practiced on it.

In *Little v. Security Mut. Life Ins. Co.*, 149 S. W. 1112, 150 Ky. 35, it was held that where, in an action on a life policy, defended on the ground of false representations, by insured in his application, it was proved that insured answered falsely, the burden was on plaintiff to show that insurer knew of the falsity of the statements in the application.

In *Bullock v. Mutual Life Ins. Co. of New York*, 166 Mich. 240, 131 N. W. 574, it was held on a policy written before the standard policy act, that where there was a warranty of answers of insured, who failed to state various illnesses, etc., evidence that he had been treated a number of times during the month preceding the application made a prima facie showing of breach of the contract, imposing on plaintiff the duty of showing that such treatment was for some ailment not tending to weaken or undermine insured's health seriously.

2127-2130. (c) Admissibility of evidence

2127 (c). Many cases have arisen presenting circumstances in which evidence bearing on the health of insured has been held admissible. Thus in *Nophsker v. Supreme Council of Royal Arcanum*, 64 Atl. 788, 215 Pa. 631, 7 Ann. Cas. 646, it was held that where defendant in an action on a policy of life insurance sets up false representations by the insured as to his health, and there is evidence that insured was afflicted with a lingering and progressive disease when he made his application, evidence of the continuance of the same disease afterwards, and until his death, was admissible.

In *Bryant v. Modern Woodmen of America*, 125 N. W. 621, 86 Neb. 372, 27 L. R. A. (N. S.) 326, 21 Ann. Cas. 365, it was held that in an action on a benefit certificate, where there was an issue as to false representations as to good health in the application, evidence was admissible to show that applicant, when he applied for insurance, knew that he was, or had been, afflicted with tuberculosis.

In *French v. Fidelity & Casualty Co. of New York*, 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011, it was held that where, in an action on an accident policy containing a schedule of warranties, the answer set out warranties and alleged that the same were false,

in that insured had been suffering from a chronic ailment, evidence of the ailment was competent to support the breach alleged.

In *Paquette v. Prudential Ins. Co.*, 79 N. E. 250, 193 Mass. 215, it was held that in an action on a policy, a description of the physical appearance of assured was competent to rebut defendant's testimony that insured appeared to be in unsound health and that his general appearance indicated excessive use of intoxicants.

In *Modern Brotherhood of America v. Jordan* (Tex. Civ. App.) 167 S. W. 794, it was held that in an action upon a benefit certificate, defended on the ground that the insured falsely stated in her application that she had never had malaria, evidence that insured completely recovered from the attack within a few days was admissible upon the issue whether the false statement was material to the risk.

In *Knights of Maccabees of the World v. Shields*, 160 S. W. 1043, 156 Ky. 270, 49 L. R. A. (N. S.) 853, rehearing denied 162 S. W. 778, 157 Ky. 35, 49 L. R. A. (N. S.) 860, it was held that evidence that insured, a physician, stated to another physician that he had had diabetes at a time prior to the application, was admissible to falsify his answers in the application denying such fact, and was not subject to limitation to insured's knowledge thereof, under Ky. St. § 639.

In *Home Circle Soc., No. 2, v. Shelton* (Tex. Civ. App.) 85 S. W. 320, it was held that in an action to recover insurance against a fraternal mutual life insurance company, in which plaintiff alleged that he and the insured had been led to believe that the condition of the insured's health at the time of application for insurance was immaterial, evidence that the defendant order had the reputation of taking anybody, whether in good health or not, was competent.

In *Ætna Life Ins. Co. of Hartford, Conn., v. Millar*, 113 Md. 686, 78 Atl. 483, it was held that in an action on a health benefit certificate, defended on the ground of misrepresentations in the application affecting the risk, evidence that insured believed that a physician he had consulted prior to the issuance of the certificate was mistaken in his opinion as to a disease from which insured suffered was admissible in explanation of his failure to disclose all that had occurred between the physician and himself in his answers to questions in the application.

In *Valentini v. Metropolitan Life Ins. Co.*, 94 N. Y. Supp. 758, 106 App. Div. 487, it was held that on an issue as to whether insured was suffering from any disease or was in need of medical attention at the time it was claimed a physician attended him, evidence as

to whether he attended his business regularly at the time was admissible.

In *Brock v. Metropolitan Life Ins. Co.*, 156 N. C. 112, 72 S. E. 213, it was held that where insurer pleaded misrepresentation as a defense to an action on a life policy, in that assured had falsely stated in her application that she had never had pneumonia or consumption, evidence of the medical examiner that he recommended the risk, not on her statement that she had never had pneumonia or consumption, but on his own examination and diagnosis of her physical condition, was admissible as some evidence that she had never suffered from pneumonia, consumption, or any other serious disease.

Where the issue was whether insured was in good health so far as he knew or believed when he made his application, evidence that to ordinary observation and to all outward appearance he was in good health was admissible (*Baer v. State Life Ins. Co.*, 256 Pa. 177, 100 Atl. 745).

In some cases the conclusion has been that certain evidence was inadmissible. Thus in *Johnson v. National Life Ins. Co.*, 144 N. W. 218, 123 Minn. 453, Ann. Cas. 1915A, 458, it was held that in an action on a life policy, wherein the defense was misrepresentations made by the insured in his application, it was error to admit in evidence the testimony of a physician as to the condition of insured four years prior to the application.

In *Deming v. Prudential Ins. Co. of America*, 169 Ill. App. 96, it was held that where the application was not made part of the policy, it was proper for the court to refuse to permit a witness offered by defendant to answer questions as to whether defendant insured the lives of persons having tuberculosis or the lives of persons whose relatives had consumption whether the answers of the applicant as to the condition of his health were material to the risk insured, and whether the policy would have been issued had the answer to one of the questions disclosed that applicant had a sister who died of consumption.

In *Rinker v. Aetna Life Ins. Co.*, 64 Atl. 82, 214 Pa. 608, 112 Am. St. Rep. 773, in an action on a life insurance policy, it appeared that the application contained an answer, "No," to the question as to whether insured ever had a severe surgical operation, and also contained a warranty of the truth of the answers, and provided that no statement made to any agent or other person not contained in the application should be considered as having been brought to the knowledge of the company. It appeared that insured had prior to

the date of the policy undergone a severe surgical operation, and plaintiff offered to show that the agent filled out the answers to the application and that the applicant signed it, at his request, without reading it. A witness testified that the applicant had stated to the agent that she had undergone an operation. It was held, that the court properly excluded the evidence.

In some cases the evidence was held partly admissible and partly inadmissible. Thus in *Turner v. Modern Woodmen of America*, 186 Ill. App. 404, an action on a benefit certificate, where the defense was that the member made false answer in his application concerning his health, defendant offered in evidence a previous application of the deceased member to another lodge, and attached thereto was an examination by the physician of such lodge in which he stated that he considered the applicant a second-class risk, etc., and it was held that the application was competent, but that the physicians' examination not signed by the applicant was incompetent because not under oath. In *Schwartz v. Royal Neighbors of America*, 108 Pac. 51, 12 Cal. App. 595, it was held that in an action on a benefit certificate, where the insurer claimed untrue answers in the application, evidence was admissible to show what took place when the application was made. It was also stated in the same case that, in an action on a benefit certificate, where defendant alleged false answers in the application as to insured's having had a miscarriage, a document signed by persons as Supreme Physicians of the insurer, setting forth certain rules to be observed in passing upon the application of a person "who has had a miscarriage," was inadmissible in evidence, it not appearing to be a by-law of the order, nor that the physician making insured's examination, or insured, knew of its existence, and that, where the insurer claimed untrue answers to a question as to whether insured had had a miscarriage, testimony of a witness as to whether a miscarriage insured had had, in fact had anything to do with one she suffered after the application, was improperly admitted as immaterial, the warranties running to the answers given in the application.

2130-2131. (d) Same—Official and other records

2130 (d). In *Jefferson v. Supreme Tent of Knights of Maccabees of the World*, 152 Ill. App. 242, it was held that it is competent to show the judgment of a court finding the applicant for insurance insane, contrary to his answers in his application, and to establish

such insanity by the opinions of physicians who saw such applicant during his confinement as an insane patient.

In *Douler v. Prudential Ins. Co. of America*, 128 N. Y. Supp. 396, 143 App. Div. 537, it was held that in an action on an insurance policy, in which defendant alleged that the insured made false representations as to her health, where the evidence showed that the policy was taken out in July, 1909, and that insured died of pulmonary tuberculosis December, 1909, and the testimony tended to show that insured was suffering from such disease for some time prior to the issuance of the policy, and there was evidence that insured stated that she had visited a physician in August, 1908, and had been informed by such physician that she had consumption, record cards of such physician and a nurse showing that a person bearing insured's name had called on the physician and nurse and that her malady had been diagnosed as pulmonary tuberculosis were material, and improperly excluded.

In *Modern Woodmen of America v. Miles*, 178 Ind. 105, 97 N. E. 1009, a record of examination of insured for admission to hospital for insane several months after issuance of policy was held incompetent, in an action on an insurance policy, to show that he was suffering from symptoms of insanity when policy was issued.

In *Patterson's Adm'r v. Modern Woodmen of America*, 89 Vt. 305, 95 Atl. 692, it was held that the report of the medical examination of the insured was properly received in evidence, where it was expressly made a part of the insurance contract. Statements in an application for a benefit certificate that deceased had never had a certain disease are the opinions of the examining physician, and admissible.

2131-2132. (e) Same—Expert and opinion evidence

2131 (e). In *McKnelly v. Brotherhood of American Yeomen*, 160 Wis. 514, 152 N. W. 169, where insured's health at time of application was in issue, confidential report of insurer's medical examiner, recommending him as good risk, was held admissible against insurer.

In *Metropolitan Life Ins. Co. v. Hayslett*, 111 Va. 107, 68 S. E. 256, it was held that where, in an action on a life policy, insurer alleged that insured fraudulently stated in the application that he was in sound health, insured's physician should be permitted to answer the question whether a man who has chronic Bright's disease

exhibiting symptoms indicated a hypothetical question asked and answered, is in good health.

In *Fidelity Mut. Life Ins. Co. v. Miazza*, 93 Miss. 18, 46 South. 817, 136 Am. St. Rep. 534, it was held that where, in an application for insurance, insured warranted that he had never been ill, except that he had yellow fever in 1878, and was overworked in 1903, suffered from insomnia and nervousness for about two weeks, from which he fully recovered, and that he had never used intoxicants, habitually or to excess, evidence of three physicians that in October, 1903, he suffered from acute mania, partly due to alcoholism and partly to overtaxation and mental worry, and that during part of the time he was totally deranged and incarcerated for safe-keeping, was admissible to show misrepresentation.

2132-2135. (f) Same—Declarations and admissions

2132 (f). In *Haughton v. Aetna Life Ins. Co.*, 73 N. E. 592, 165 Ind. 32, transferred from Appellate Court (App. 1904) 72 N. E. 652, it was held that, on the issue of fraud in the procurement of a policy of life insurance, statements made by insured, near the time of the issuance of the policy, in explanation of his appearance, walk, the smell of medicines about his person, and as to the impaired condition of his health and his having suffered a surgical operation, were admissible to show insured's knowledge of his physical condition at the time of making out his application for insurance.

In *Ranta v. Supreme Tent, Knights of Maccabees of the World*, 107 N. W. 156, 97 Minn. 454, it was held that where, in an action to recover on a life insurance policy, the court charged that the statements of deceased as to his health were a warranty, it is competent for the jury to consider the admissions of the officers of the insurance order as to the cause of death.

2142-2143. (h) Weight and sufficiency of evidence

2142 (h). *Scofield's Adm'x v. Metropolitan Life Ins. Co.*, 64 Atl. 1107, 79 Vt. 161, 8 Ann. Cas. 1152, was an action on a life policy void if answers in the application were false. The insurer claimed that the insured falsely stated in his application that he had never had consumption. It appeared that the policy was issued November 30th, and that a brother of insured had received, during the following winter, a letter from him mailed in Colorado. It was held that the letter did not prove that the insured had consumption

though it proved that insured had gone to Colorado to reside temporarily or permanently.

In *Perry v. John Hancock Mut. Life Ins. Co.*, 111 N. W. 195, 147 Mich. 645, it was held that in an action on a policy the special finding of the jury that a physician was treating assured at the time she stated that she was in good health was not conclusive for defendant, where the jury found in their general verdict that assured did not at the time have the disease he claims he treated her for and from which she died.

Metropolitan Life Ins. Co. v. Moravec, 73 N. E. 415, 214 Ill. 186, reversing (1904) 116 Ill. App. 271, was an action on a life insurance policy, in which the defense was that the insured had falsely stated in her application that she had never had heart disease. A physician testified that during a certain year he had offices in the N. building, and there treated one B. for heart disease until he was convinced she was incurable, and then returned the money she had paid him. Another witness testified that insured's maiden name was B., that during the year aforesaid B. had said that she had received medical treatment from a physician whose office was in the N. building, and that she wanted to get back her money from such physician. It was held sufficient to entitle defendant to an instruction on the theory that assured had suffered from heart disease.

In *Michigan Mut. Life Ins. Co. v. Whittaker*, 28 Ohio Cir. Ct. R. 688, it was held that the concealment by an applicant for life insurance, of the condition of his health, it appearing from the testimony that three physicians had informed him of the serious nature of his malady, one refusing to pass him for insurance, another telling him that he had an organic lesion of the heart, and the third discovering and disclosing to him an enlargement of the spleen, will sustain the defense of fraud in an action on his policy, even though the physician examining him on behalf of the company failed to discover anything abnormal in the condition of his health.

In *Rodier v. Life Ins. Co. of Virginia*, 32 App. D. C. 159, it was held, where the insured in an application for a policy of life insurance, the statements in which were expressly warranted to be true, stated that he was a groceryman, and not engaged in selling liquor, and also that he had never had any disease of the stomach or bowels, while the proof of death, consisting of affidavits of the mother of the deceased and the beneficiary under the policy, and of the insured's physician, offered in evidence by the administratrix of the insured in an action on the policy, shows that the insured at the

date of the policy and until his death was a liquor dealer, and that his death was caused by acute indigestion, of which he had had several attacks during the year or two preceding the date of the policy, the trial court properly directs a verdict for the defendants.

In *National Council of the Knights and Ladies of Security v. Sealey* (Tex. Civ. App.) 162 S. W. 455, a denial by an applicant for membership in a fraternal insurance order that he ever had inflammatory or acute rheumatism was held not as a matter of law a misrepresentation under the laws of the order.

In *Diamond v. Metropolitan Life Ins. Co.* (Sup.) 116 N. Y. Supp. 617, it was held that where the policy was issued in December, 1904, and insured died July 22, 1905, two physicians testifying that he died of pulmonary tuberculosis and in their opinion he had been "ill" from 14 months to 2 years, but not testifying as to the nature of his illness, the company cannot avoid payment on the ground of breach of warranty of soundness of health and freedom from consumption.

In *United States Casualty Co. v. Campbell*, 146 S. W. 1121, 148 Ky. 554, it was held that the act of an insurance agent in filling out an application contrary to facts, including certain warranties, merely on the statement made in a letter of insured that he was in good health, did not conclusively show fraud by the insured.

In *Thompson v. Metropolitan Life Ins. Co.*, 113 N. Y. Supp. 225, 128 App. Div. 420, order affirmed 92 N. E. 1104, 198 N. Y. 582, it was held that, where insured in his application stated that he had never been under treatment in any dispensary, hospital, etc., the bare statement of plaintiff, the beneficiary, after the death of insured, in answer to the question whether deceased had ever been an inmate of or received treatment at any hospital, etc.: "Yes, about eight years, but do not remember what for"—was insufficient to sustain the imputation of fraud.

In *Thompson v. Royal Neighbors of America*, 154 Mo. App. 109, 133 S. W. 146, it was held that a recital in the certificate that insurer was a benevolent association was not evidence of that fact.

The sufficiency of the evidence generally was considered in *Klein v. National Protective Legion*, 179 Ill. App. 605; *Yonda v. Royal Neighbors of America*, 148 N. W. 928, 98 Neb. 730; *Modern Brotherhood of America v. Jordan* (Tex. Civ. App.) 167 S. W. 794; *Berman v. Fraternities Health & Accident Ass'n*, 78 Atl. 462, 107 Me. 368; *Metropolitan Life Ins. Co. v. Betz*, 44 Tex. Civ. App. 557, 99 S. W. 1140; *Colaneri v. General Acc. Assur. Corp.*, 110 N. Y. Supp. 678, 128 App. Div. 591; *Iowa Life*

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Ins. Co. v. Haughton (Ind. App.) 85 N. E. 127; *Murphy v. Metropolitan Life Ins. Co.*, 118 N. W. 355, 106 Minn. 112; *Adams v. American Patriots*, 141 S. W. 21, 159 Mo. App. 340; *Thompson v. Royal Neighbors of America*, 154 Mo. App. 109, 133 S. W. 146; *McKnelly v. Brotherhood of American Yeomen*, 160 Wis. 514, 152 N. W. 169; *Brashear v. American Patriots*, 144 S. W. 163, 161 Mo. App. 566; *Knights of Maccabees of the World v. Hunter*, 143 S. W. 359, 57 Tex. Civ. App. 115, judgment reversed (1910) 103 Tex. 612, 132 S. W. 116; *Schwartz v. Royal Neighbors of America*, 108 Pac. 51, 12 Cal. App. 595; *Mudge v. Supreme Court*, 1 I. O. F., 112 N. W. 1130, 149 Mich. 467, 14 L. R. A. (N. S.) 279, 119 Am. St. Rep. 686; *Lyon v. United Moderns*, 83 Pac. 804, 148 Cal. 470, 4 L. R. A. (N. S.) 247, 113 Am. St. Rep. 291, 7 Ann. Cas. 672; *O'Connor v. Grand Lodge A. O. U. W. of California*, 80 Pac. 688, 146 Cal. 484; *Globe Mut. Life Ins. Ass'n v. Meyer*, 118 Ill. App. 155.

The sufficiency of the evidence to warrant submission to the jury was considered in *Winn v. Modern Woodmen of America*, 119 S. W. 536, 138 Mo. App. 701, motion to retax costs denied 146 Mo. App. 69, 123 S. W. 59; *Perea v. State Life Ins. Co. of Indianapolis, Ind.*, 15 N. M. 399, 110 Pac. 559; *Scofield's Adm'r v. Metropolitan Life Ins. Co.*, 64 Atl. 1107, 79 Vt. 161, 8 Ann. Cas. 1152; *Fidelity Mut. Life Ins. Co. v. Beck*, 104 S. W. 533, 84 Ark. 57, rehearing denied 104 S. W. 1102, 84 Ark. 57; *Security Mut. Life Ins. Co. v. Calvert*, 100 S. W. 1033, judgment reversed 101 Tex. 128, 105 S. W. 320; *Fidelity Mut. Life Ins. Co. v. Miazza*, 93 Miss. 18, 46 South. 817, 136 Am. St. Rep. 534; *Sovereign Camp of Woodmen of the World v. Latham*, 59 Ind. App. 290, 107 N. E. 749; *Healy v. Metropolitan Life Ins. Co.*, 37 App. D. C. 240; *Security Mut. Life Ins. Co. v. Little*, 162 S. W. 1131, 157 Ky. 276; *Pelican v. Mutual Life Ins. Co. of New York*, 44 Mont. 277, 119 Pac. 778; *Baker v. Metropolitan Life Ins. Co.*, 106 S. C. 419, 91 S. E. 324; *Brigham v. Mutual Life Ins. Co. of New York*, 95 Wash. 196, 163 Pac. 380; *Goertz v. Continental Life Ins. & Inv. Co.*, 95 Wash. 358, 163 Pac. 938; *National Life & Accident Ins. Co. v. Langford*, 123 Ark. 619, 185 S. W. 266.

2143-2144. (i) Trial

2143 (i). In *Winn v. Modern Woodmen of America*, 119 S. W. 536, 138 Mo. App. 701, motion to retax costs denied (Mo. App.) 123 S. W. 59, it was held that a fraternal benefit society should be held to strict proof of the defense that insured made false answers to questions asked in his physical examination.

In *Metropolitan Life Ins. Co. v. Hayslett*, 111 Va. 107, 68 S. E. 256, it was held that where, in an action on a life policy, insurer alleged that insured fraudulently stated in the application that he was in sound health, insurer should be allowed to a reasonable ex-

tent to accumulate proof on the point that insured was at the time in ill health.

2144-2146. (j) Same—Questions for jury

2144 (j). Where the evidence is conflicting the question whether there has been a false statement should be submitted to the jury.

Brotherhood of Railroad Trainmen v. Swearingen, 161 Ky. 665, 171 S. W. 455; *Perry v. John Hancock Mut. Life Ins. Co.*, 106 N. W. 860, 143 Mich. 290; *Nyman v. Manufacturers' & Merchants' Life Ass'n*, 104 N. E. 653, 262 Ill. 300; *Barker v. Metropolitan Life Ins. Co.*, 84 N. E. 490, 198 Mass. 375; *Adams v. Modern Woodmen of America*, 145 Mo. App. 207, 130 S. W. 113; *Little v. Security Mut. Life Ins. Co.*, 149 S. W. 1112, 150 Ky. 35; *Mutual Life Ins. Co. v. Robinson*, 115 Md. 408, 80 Atl. 1085; *Logan v. Court of Honor*, 153 S. W. 73, 168 Mo. App. 195; *Bruck v. John Hancock Mut. Life Ins. Co.*, 194 Mo. App. 529, 185 S. W. 753; *Henegan v. Colonial Life Ins. Co. of America*, 63 Pa. Super. Ct. 616; *Baer v. State Life Ins. Co.*, 256 Pa. 177, 100 Atl. 745; *Remfry v. Mutual Life Ins. Co. of New York (Mo. App.)* 196 S. W. 775; *New York Life Ins. Co. v. Montgomery*, 115 Miss. 350, 76 South. 257.

Materiality of the statements in case of doubt is for the jury.

Hines v. New England Casualty Co., 172 N. C. 225, 90 S. E. 131, L. R. A. 1917B, 744; *Feinberg v. New York Life Ins. Co.*, 256 Pa. 61, 100 Atl. 538; *Collins v. Casualty Co. of America*, 112 N. E. 634, 224 Mass. 327, L. R. A. 1916E, 1203; *Kelly v. Mutual Life Ins. Co. of New York*, 93 N. E. 605, 207 Mass. 398; *Fidelity Mut. Life Ins. Co. v. Miazza*, 93 Miss. 422, 48 South. 1017; *Trenton v. North American Acc. Ins. Co. (Tex. Civ. App.)* 89 S. W. 276; *Kidder v. Supreme Commandery United Order of Golden Cross*, 78 N. E. 469, 192 Mass. 326; *Miller v. Maryland Casualty Co.*, 193 Fed. 343, 113 C. C. A. 267; *United States Casualty Co. v. Campbell*, 146 S. W. 1121, 148 Ky. 554; *Barker v. Metropolitan Life Ins. Co.*, 84 N. E. 490, 198 Mass. 375; *Rathman v. New Amsterdam Casualty Co.*, 186 Mich. 115, 152 N. W. 983, L. R. A. 1915E, 980, Ann. Cas. 1917C, 459.

The good faith of the insured in making his statements as to health is, in case of doubt, for the jury.

Yeomen of America v. Rott, 140 S. W. 1018, 145 Ky. 604; *Barker v. Metropolitan Life Ins. Co.*, 84 N. E. 490, 198 Mass. 375; *Pelican v. Mutual Life Ins. Co. of New York*, 44 Mont. 277, 119 Pac. 778 (statutory); *Collins v. Catholic Order of Foresters*, 43 Ind. App. 549, 88 N. E. 87; *Ford v. Metropolitan Life Ins. Co.*, 79 N. J. Law, 60, 74 Atl. 253; *Suravitz v. Prudential Ins. Co. of America*,

91 Atl. 495, 244 Pa. 582, L. R. A. 1915A, 273; *Mutual Life Ins. Co. of New York v. Owen*, 111 Ark. 554, 164 S. W. 720; *Kelper v. Equitable Life Assur. Soc. of United States (C. O.)* 159 Fed. 206; (1908) *Thompson v. Metropolitan Life Ins. Co.*, 113 N. Y. Supp. 225, 128 App. Div. 420, order affirmed (1910) 92 N. E. 1104, 198 N. Y. 582; *Metropolitan Life Ins. Co. v. Johnson*, 49 Ind. App. 233, 94 N. E. 785.

Whether a disease, the existence of which was denied really existed during the period covered by the inquiry, is a question for the jury.

Miller v. Maryland Casualty Co., 193 Fed. 343, 113 C. C. A. 267; *Sternaman v. Metropolitan Life Ins. Co.*, 73 N. E. 1133, 181 N. Y. 514, affirming 87 N. Y. Supp. 904, 94 App. Div. 610; *Kelly v. Mutual Life Ins. Co. of New York*, 93 N. E. 695, 207 Mass. 398; *Schmitt v. Michigan Mut. Life Ins. Co.*, 91 N. Y. Supp. 448, 101 App. Div. 12; *Monahan v. Metropolitan Life Ins. Co.*, 180 Ill. App. 390; *Hoeland v. Western Union Life Ins. Co. of Spokane*, 58 Wash. 100, 107 Pac. 866; *McIntyre v. Modern Woodmen of America*, 200 Fed. 1, 121 C. C. A. 1; *Manning v. Metropolitan Life Ins. Co.*, 80 N. J. Law, 72, 76 Atl. 334; *French v. Fidelity & Casualty Co. of New York*, 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011; *Clark v. Metropolitan Life Ins. Co.*, 62 Pa. Super. Ct. 192; *Hicks v. Metropolitan Life Ins. Co.*, 196 Mo. App. 162, 190 S. W. 661.

Where, however, there is no conflict of evidence, the question as to the existence of disease should not be submitted to the jury.

Nyman v. Manufacturers' & Merchants' Life Ass'n, 104 N. E. 653, 262 Ill. 300; *Security Mut. Life Ins. Co. v. Calvert*, 87 S. W. 889, 39 Tex. Civ. App. 382; *Knights of Maccabees of the World v. Hunter*, 103 Tex. 612, 132 S. W. 116.

In *Gruber v. German Roman Catholic Aid Ass'n of Minnesota*, 113 Minn. 340, 129 N. W. 581, it was held that the question, in an action on a life policy, whether the application failed to disclose a prior serious or permanent illness, was one of fact for the jury.

In *Collins v. Catholic Order of Foresters*, 43 Ind. App. 549, 88 N. E. 87, it was held that whether biliousness and indigestion constitute a "severe illness" within the meaning of an application for life insurance is for the jury, and not for the court.

In *Barker v. Metropolitan Life Ins. Co.*, 74 N. E. 945, 188 Mass. 542, it was held that in an action on a policy of insurance, where it appeared that the insured was apparently in good health when the insurance was taken, and became ill the following month, undergoing an operation for cystic disease of the kidneys, it was for the

jury to determine, the evidence being conflicting, whether the condition of the kidneys could have developed from a sound condition within the time.

In *O'Connor v. Grand Lodge A. O. U. W. of California*, 80 Pac. 688, 146 Cal. 484, it was held that where the parties to a contract of insurance have made the matter material as to an applicant, at the time of making application, having been affected by rheumatism, the only question for the jury is whether he had been, in fact, so affected, and, if so, whether his unqualified denial of the fact was a willfully erroneous misstatement.

In *Mutual Life Ins. Co. v. Robinson*, 115 Md. 408, 80 Atl. 1085, it was held that, whether a statement in the application that insured is in good health be a warranty or representation, the question of good faith, or of its truth or materiality, is ordinarily for the jury, though, where either bad faith of the applicant or the falsity or materiality of the misrepresentations is shown by uncontradicted evidence, the court may determine the question as a matter of law, and may instruct that certain diseases, such as cancer, tuberculosis, or Bright's disease, are material to the risk, since the company's knowledge that the applicant had either would necessarily influence it in passing upon the risk.

2146-2147. (k) Same—Instructions

2146 (k). In *Modern Order of Prætorians v. Hollmig* (Tex. Civ. App.) 103 S. W. 474, judgment reversed on rehearing (Tex. Civ. App.) 105 S. W. 846, it was held that, in an action on an insurance certificate, an instruction using the words "serious disease," instead of "serious illness," was not objectionable as misleading, both expressions having practically the same meaning.

In *Ætna Life Ins. Co. of Hartford, Conn., v. Millar*, 113 Md. 686, 78 Atl. 483, it was held that in an action on a health benefit certificate, defended on the ground of false statements in the application, an instruction, not taking into account insured's good faith in making the statement and whether the ailment not disclosed was temporary or permanent, serious or trifling, was properly refused.

In *Fidelity Mut. Life Ins. Co. v. Miazza*, 93 Miss. 422, 48 South. 1017, where, in an action on a life policy, it was a jury question whether a misrepresentation by insured respecting an illness in applying for insurance might have influenced the company it was not error to instruct that plaintiff could recover if insured made no untrue statements material to the risk.

In *Sullivan v. Metropolitan Life Ins. Co.*, 88 Pac. 401, 35 Mont. 1, it was held that, it being declared by a life policy that it itself "contains the entire agreement" between the insurer and insured, and the defense to an action thereon being breach of the provision of the policy that it should be void if insured had been attended by a physician for any serious disease within two years prior to date of the policy, or had before such date had any pulmonary disease, the giving of an instruction that, if insured was acting in good faith when he answered the questions in the application and any wrong answers were not material, the jury should find for plaintiff, is improper; it relating to an immaterial matter.

In *Wilson v. Royal Neighbors of America*, 102 N. W. 957, 139 Mich. 423, in an action on a life insurance policy, the defense was false warranty, in that insured stated in her application that she had not consulted a physician within seven years, and had never had heart disease. On this issue, the court, after stating the claim of defendant, and telling the jury that they had heard the testimony of certain physicians, charged: "You have heard the testimony of the other physician. You know all of the attendant circumstances, and it is for you gentlemen to say what the real facts were with reference to that matter. You have heard her statement as given in the application. If you find that she had consulted a physician within the seven years with reference to this ailment, the difficulty of the heart, that will dispose of this case." It was held that the charge, taken as a whole, was not subject to the objection of telling the jury that they could consider insured's statement in the application as evidence of its own truthfulness.

In *Illinois Life Ins. Co. v. De Lang*, 124 Ky. 569, 99 S. W. 616, 30 Ky. Law Rep. 753, insured, who died of consumption, stated in the application that he had had no lung trouble, that he had consulted no physician for several years, and that he had never changed his residence for his health. There was evidence that a year before the application he had consulted physicians who told him he had consumption, and that he then went to another climate on that account. It was held that instructions to find for plaintiff unless the jury believe that insured had consumption when he made his application, or that answers in the application were untrue in some particular, in which true answers would have stated facts or conditions which were reasonably and ordinarily calculated to shorten the life or increase the probability of the death of insured, or which, if known to the insurer, would have stopped it, acting naturally and

reasonably, from entering into the contract, are erroneous. In place thereof the jury should have been instructed that the question for them to decide was whether any of the answers were substantially untrue, and, if so, whether, according to the usual course of the insurance business, the policy would have been issued if the truth had been stated.

2147-2148. (1) Same—Verdict

2147 (1). In *Court of Honor v. Dinger*, 77 N. E. 557, 221 Ill. 176, it was held that where, in an action on a benefit certificate, the defense was that the member was not in good health at the time he was reinstated after suspension for nonpayment of dues, and the general verdict was in favor of plaintiff, and the jury answered, in response to questions, that the member was in reasonably good health when he was reinstated, but that he was suffering with chronic laryngitis, the general verdict was not inconsistent with the special findings.

In *Crosse v. Supreme Lodge Knights and Ladies of Honor*, 98 N. E. 261, 254 Ill. 80, 45 L. R. A. (N. S.) 162, however, it was held that, where an applicant warranted that she had not consulted a physician within seven years, a special finding, in an action on the certificate, that insured consulted a physician within five years of the medical examination, was inconsistent with the general verdict for the beneficiary, and under Practice Act, § 79, judgment should have been rendered for defendant.

**19. EFFECT OF MISREPRESENTATION, BREACH OF WARRANTY,
OR CONCEALMENT AS TO INJURY OR BODILY INFIRMITY**

2150-2153. (c) What constitutes injury or bodily infirmity

2150 (c). In *Lynch v. Travelers' Ins. Co.*, 200 Fed. 193, 118 C. C. A. 379, that insured was born without fingers on his right hand was held a "bodily deformity," avoiding the policy for breach of a warranty that he had no bodily deformity.

In *French v. Fidelity & Casualty Co. of New York*, 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011, it was held that bodily infirmity means a settled disease, an ailment that will probably result to some degree in the general impairment of physical health and vigor, and the words "bodily infirmity," as used in an accident policy exempting the insurer from liability, only includes an ailment of a somewhat established or settled character, and not mere-

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ly a temporary disorder arising from a sudden and unexpected derangement of the system.

In *Trenton v. North American Acc. Ins. Co.* (Tex. Civ. App.) 89 S. W. 276, it was held that where insured, in his application for accident insurance, warranted that he had never had "paralysis, fits of any kind, brain disorder, diabetes, hernia, varicose veins, or any bodily or mental infirmity, injuries or wounds," or suffered the loss of a limb or an eye, except as stated, and that he had never been ruptured or "otherwise injured," the words "injuries or wounds" and "otherwise injured" should be construed to refer only to such serious other wounds or injuries not specified as might affect the risk. In *North American Acc. Ins. Co. v. Trenton* (Tex. Civ. App.) 99 S. W. 740, a subsequent appeal in the same case, there was evidence that insured's agent, who solicited the policy, was told by insured that his foot had been mashed at one time, and that he had sustained certain slight injuries to his fingers, but was informed that these were of no consequence. It was held, that insurer construed the application only to require disclosure of such injuries as increased the risk.

2153-2154. (d) Slight or trivial injuries or infirmities

2153 (d). Where false statements of deceased in his application for life insurance in a fraternal association related to slight injuries which did not affect his general health, they will not avoid contract unless material to and increase risk of loss (*Witherow v. Mystic Toilers* [Utah] 161 Pac. 1126).

2154. (e) Surgical operations

2154 (e). In *Ladies of Maccabees of the World v. Kendrick* (Tex. Civ. App.) 165 S. W. 110, it was held that a negative answer to a question asked insured, "Have you ever had a surgical operation performed or received treatment in a hospital, sanitarium, retreat, or any public or private institution for the treatment of physical or mental disease?" was not made false by proof that insured had been operated on by a physician by surgical instruments at her home. It was also stated in the same case that a comma will not be supplied by construction after the word "performed" in order to make false a negative answer to a question asked insured, "Have you ever had a surgical operation performed or received treatment in a hospital * * * or any public or private institution for the treatment of * * * disease?" where the proof showed that insured had been operated on at her home.

In *Hermann v. Court of Honor*, 193 Ill. App. 366, however, the denial by a woman in an application for life insurance of previous illnesses or surgical operations were held warranties, which avoided a policy, where she had had previously a major operation.

2154-2155. (f) Questions of practice

2154 (f). In *North American Acc. Ins. Co. v. Trenton* (Tex. Civ. App.) 99 S. W. 740, it was held that, where an insurer so construed its policy as only to require a disclosure of such injuries as insured had suffered which increased the risk, whether certain injuries which insured sustained and did not disclose did increase the risk was for the jury.

In *Continental Casualty Co. v. Owen*, 38 Okl. 107, 131 Pac. 1084, under the evidence in an action on an accident insurance policy, it was held a question for the jury whether insured was suffering from a "defect in the body," within the meaning of that phrase in his statement indorsed on the policy.

In *Smith v. Travelers' Ins. Co.*, 135 N. Y. Supp. 18, 76 Misc. Rep. 441, whether warranties in a health policy that insured had not been disabled were violated was held for the jury.

**20. EFFECT OF MISREPRESENTATION, BREACH OF WARRANTY,
OR CONCEALMENT AS TO CONSULTATION OF OR
ATTENDANCE BY PHYSICIANS**

2156-2158. (a) Effect of false statement or concealment

2156 (a). Statements as to the consultation of or attendance by physicians are warranties, material to the risk, and, if false, avoid the policy.

Colaneri v. General Acc. Assur. Corp., 110 N. Y. Supp. 678, 126 App. Div. 591; *Metropolitan Life Ins. Co. v. Brubaker*, 78 Kan. 146, 96 Pac. 62, 18 L. R. A. (N. S.) 362, 130 Am. St. Rep. 356, 16 Ann. Cas. 267; *Griffith v. Metropolitan Life Ins. Co. of New York*, 36 App. D. C. 8; *Modern Woodmen of America v. Angle*, 104 S. W. 297, 127 Mo. App. 94; *National Union v. Kelley*, 140 Pac. 1157, 42 Okl. 98; *Metropolitan Life Ins. Co. v. Goodman*, 65 South. 449, 10 Ala. App. 446; *Supreme Lodge K. P. v. Bradley*, 132 S. W. 547, 141 Ky. 334, reversing (Ky.) 117 S. W. 275; *Brunjes v. Metropolitan Life Ins. Co.*, 83 N. J. Law, 296, 84 Atl. 1062; *Life Ass'n of America v. Edwards*, 159 Fed. 53, 86 C. C. A. 243; *Rathman v. New Amsterdam Casualty Co.*, 152 N. W. 983, 186 Mich. 115, L. R. A. 1915E, 980, Ann. Cas. 1917C, 459.

In some cases it is stated that misrepresentations in this regard are material and invalidate the policy.

Rigby v. Metropolitan Life Ins. Co., 87 Atl. 428, 240 Pa. 332; *Schas v. Equitable Life Assur. Society*, 81 S. E. 1014, 166 N. C. 55; *Germania Life Ins. Co. of New York City v. Klein*, 137 Pac. 73, 25 Colo. App. 326; *Hoffman v. Metropolitan Life Ins. Co.*, 141 App. Div. 713, 128 N. Y. Supp. 436; *Cohen v. Metropolitan Life Ins. Co.*, 147 N. Y. Supp. 434, 85 Misc. Rep. 406; *Mutual Life Ins. Co. of New York v. Mullan*, 107 Md. 457, 69 Atl. 385; *Gerlach v. Metropolitan Life Ins. Co. (Sup.)* 112 N. Y. Supp. 1095; *Mutual Life Ins. Co. of New York v. Mullan*, 107 Md. 457, 69 Atl. 385; *Sowiczki v. Modern Woodmen of America*, 192 Mich. 265, 158 N. W. 891; *Seaback v. Metropolitan Life Ins. Co.*, 113 N. E. 862, 274 Ill. 516, affirming, 196 Ill. App. 76; *Metropolitan Life Ins. Co. v. Solomito*, 184 Ind. 722, 112 N. E. 521; *French v. Modern Woodmen of America*, 194 Ill. App. 438; *Peterson v. Independent Order of Foresters*, 156 N. W. 951, 162 Wis. 562; *Mutual Life Ins. Co. v. Leaksville Woolen Mills*, 172 N. C. 534, 90 S. E. 574.

In *Metropolitan Life Ins. Co. v. Goodman*, 65 South. 449, 10 Ala. App. 446, it was held that a provision in a life policy that it should be void if insured, before its date, had been attended by a physician for any serious disease, is a warranty rather than a condition, and so falls within Code 1907, § 4572.

In *Mutual Life Ins. Co. of New York v. Allen*, 174 Ala. 511, 56 South. 568, it was held that under Code 1907, § 4572, providing that no misrepresentation in a policy of life insurance, or in a negotiation of a contract for life insurance, or in the application therefor, shall avoid the policy, unless made with actual intent to deceive, or unless the matter misrepresented increases the risk of loss, a mere misrepresentation as to whether insured had consulted a physician between the time of taking out the policy and making application for its reinstatement is not a sufficient defense, without showing that such misrepresentation was made with intent to deceive, or that it increased the risk of loss, since it is neither the natural nor the necessary effect of such misrepresentation to show intent to deceive or increase of risk.

In *Modern Woodmen of America v. Lawson*, 110 Va. 81, 65 S. E. 509, 135 Am. St. Rep. 927, it was held that under Pollard's Code Biennial of 1908, § 28, p. 483, providing that no answer to interrogatories in an application shall bar a recovery unless such answer was willfully false or fraudulently made or was material, if insured falsely stated in his application that he had not been treated by a physi-

cian within the last seven years preceding his application, no recovery could be had on the policy if such statement was material or willfully or fraudulently made.

In *Bryant v. Metropolitan Life Ins. Co.*, 60 S. E. 983, 147 N. C. 181, it was held that under 2 Revisal 1905, § 4808, providing that all statements in any application for a policy of insurance, or in the policy itself, shall be held representations and not warranties, nor shall any representation, unless material or fraudulent, prevent a recovery on the policy, a misrepresentation to be material need not be as to a defect which contributes to the loss for which indemnity is claimed, but every fact untruly asserted or wrongfully suppressed must be regarded as material, if the knowledge or ignorance of it would naturally influence the underwriter in making the contract at all, in estimating the degree and character of the risk, or in fixing the rate of premiums; hence a statement in an application for life insurance that the applicant had not been under the care of a physician within two years would be a material representation.

In *Modern Order of Prætorians v. Hollmig* (Tex. Civ. App.) 105 S. W. 846, it was held, reversing judgment in (Tex. Civ. App.) 103 S. W. 474, that where a member of a beneficiary association falsely warranted in his application for membership that he had not consulted with or been treated by a physician, there can be no recovery against the association, since Acts 1903, p. 94, c. 69 (Rev. St. 1895, art. 3096aa), providing that any provision in an insurance policy that statements made in the application, if false, shall render the contract void, shall be of no effect unless the misrepresentations are shown to be material to the risk, etc., does not apply to beneficiary associations.

In *Peterson v. Manhattan Life Ins. Co.*, 91 N. E. 466, 244 Ill. 329, 18 Ann. Cas. 96, it was held, reversing 115 Ill. App. 421, that, although a policy of insurance refers to and makes the application a part of the policy, only statements made strictly in answer to the inquiries contained in the application can be regarded as warranties, and an answer, "Has not been sick," to a question in an application for life insurance, "Give the names and addresses of physicians who have attended you, or whom you have consulted during the last ten years, and for what diseases," was not responsive and created no warranty.

In *Modern Order of Prætorians v. Hollmig* (Tex. Civ. App.) 103 S. W. 474, judgment reversed on rehearing (Tex. Civ. App.) 105 S. W. 846, it was held that a misstatement in an application for in-

surance concerning proper medical attendance and treatment of the applicant was not material to the risk as a matter of law, but its materiality depended on the surrounding circumstances.

In *Diamond v. Metropolitan Life Ins. Co.*, 116 N. Y. Supp. 617, insured was examined before the policy was issued, and stated in his application that he had never been treated in a dispensary, when he in fact had been so treated a year before for an unknown ailment. He died about 8 months after he was insured; his wife stating that he had been ill about 2 months, and two physicians who attended him at his death testifying that in their opinion he had been "ill" for 14 months and 2 years, respectively, and that he died of pulmonary tuberculosis, but did not state the nature of his illness. It was held that it could not be said that the company would have rejected the policy, had it known that insured had been treated in a dispensary, and there was not a breach of warranty, so as to avoid the policy.

2158-2159. (b) Interpretation of questions as to medical attendance

2158 (b). In *Modern Woodmen of America v. Wilson*, 107 N. W. 568, 76 Neb. 344, it was held that, in answer to a question in an application for life insurance calling for the names of the ailments for which assured had been treated and the names of his physicians, the assured is not required to give the name of every trifling ailment or of every physician he has consulted.

In *Catholic Order of Foresters v. Collins*, 51 Ind. App. 285, 99 N. E. 745, it was held that, in order to defeat recovery under a mutual benefit insurance certificate for breach of warranty in an application that insured had not sought medical advice "within the last three years," the advice must have been sought within three years from the date of the application, and not from the issuance of the certificate.

In *Smith v. Bankers' Life Ass'n*, 123 Ill. App. 392, a question in an application for insurance as follows, "How long since you consulted a physician?" was construed as susceptible of the interpretation, "How long since you first consulted a physician?"

In *Crosse v. Supreme Lodge Knights and Ladies of Honor*, 98 N. E. 261, 254 Ill. 80, 45 L. R. A. (N. S.) 162, however, it was held that questions asked an applicant: "How long since you were attended by a physician or professionally consulted one?" "For what disease?" "Give name and residence of physician." "Are you in good health?" "Do you usually have good health?"—were not ambigu-

ous, and a false answer cannot be excused on the ground of the applicant's misunderstanding.

In *Hanrahan v. Metropolitan Life Ins. Co.*, 63 Atl. 280, 72 N. J. Law, 504, in an application for a life insurance policy, to an inquiry for the name of the physician who last attended the applicant, the date of the attendance, and the name of the complaint, the applicant answered, "Fifteen years ago; pneumonia," but omitted to state the name of the physician. It was held, that the inquiry as to the date of attendance related to the last attendance.

2159-2161. (c) Interpretation of statements as true or false

2159 (c). An answer to a question concerning previous consultations with physicians, which admits one examination and omits others clearly proved, but does not purport to be a full reply to all questions in that connection, is not affirmatively shown to have been false, so as to prevent recovery on the policy.

Rupert v. Supreme Court of United Order of Foresters, 102 N. W. 715, 84 Minn. 293; *Smith v. Bankers' Life Ass'n*, 123 Ill. App. 392.

In *Cunningham v. Modern Brotherhood of America*, 148 N. W. 918, 96 Neb. 827, it was held that, where a fraternal benefit association assumes the risk without deception on the part of insured, it is liable, though insured has not given the name of every ailment possessed or the name of every physician consulted by him.

In *Valentini v. Metropolitan Life Ins. Co.*, 94 N. Y. Supp. 758, 106 App. Div. 487, it was held that consultation of a physician by insured's mother with or without his knowledge when he was not suffering from any ailment or disease did not constitute a breach of warranty in a policy, in the application for which insured neglected to disclose such fact.

In *National Council of the Knights and Ladies of Security v. Sealey* (Tex. Civ. App.) 162 S. W. 455, where it appeared that insured had only been given electric treatments for a stiff back, a denial that he had been treated by a physician for any disease within five years was held not a representation material to the risk within Rev. Civ. St. 1911, art. 4834.

In *Haughton v. Aetna Life Ins. Co. of Hartford, Conn.*, 42 Ind. App. 527, 85 N. E. 125, rehearing denied 42 Ind. App. 527, 85 N. E. 1050, insured, in an application, was asked the name and residence of his physician, "the one whom you have personally employed or consulted," to which he answered, "Have none." In an action on the policy, it was found that he had previously person-

ally consulted a physician with respect to his health, but that he had not "personally employed a physician." It was held that the finding did not establish a breach of warranty in the answer to such question.

In *Raymer v. Modern Brotherhood of America*, 157 Ill. App. 510, to the question in an application for insurance, "Where and by what physician were you last attended, and for what complaint?" the answer given was, "None." It was held, that evidence that the applicant had prior to the making of such answer called upon doctors at their offices for advice did not establish the falsity and lack of good faith in making such answer.

In *Reppond v. National Life Ins. Co.*, 100 Tex. 519, 101 S. W. 786, 11 L. R. A. (N. S.) 981, 15 Ann. Cas. 618, it was held, reversing (Tex. Civ. App.) 96 S. W. 778, that where an application for life insurance recited that the statements made by applicant to the company's medical examiner were warranted to be complete and true, and without suppression of any fact tending to influence the company in issuing the policy, and that they should be the basis of the contract, the parties meant that applicant should in good faith answer truthfully and fully all the questions propounded to him, and not intentionally suppress any fact, material to the risk, and the statements amounted to representations only, and the applicant's failure to name one of the physicians who attended him within the preceding five years was not a breach of a warranty defeating the policy.

In *Aaronson v. New York Life Ins. Co.*, 142 N. Y. Supp. 568, 81 Misc. Rep. 228, it was held that a representation, in an application for a policy of life insurance, that insured had not been under the care of a physician since the previous summer, when in fact he had consulted numerous physicians within two weeks prior to the date of the application with reference to a disease of the eye, was false.

In *Colaneri v. General Acc. Assur. Corp.*, 110 N. Y. Supp. 678, 126 App. Div. 591, it was held that where an applicant for health insurance stated in his application as a warranty that he had never received any injury or suffered from any disease or sickness of any character; that he was of sound condition mentally and physically and had no infirmity or defect, mental or physical, not stated; that he had not had any medical or surgical treatment during the past five years except for stomach trouble for about four weeks, from which he had fully recovered, and there was no statement

of any trouble with the ear, but proofs of loss showed that he had suffered from the same ear trouble for which he claimed a benefit within two years before and had received medical treatment therefor—there was a breach of warranty precluding a recovery, even if the insured stated that he had been troubled with deafness.

Failure of insured to fill in a blank in an application for reinstatement has been held not equivalent to a statement that he had received no services or advice from a physician (*Stanyan v. Security Mut. Life Ins. Co.* [Vt.] 99 Atl. 417, L. R. A. 1917C, 350).

2161-2163. (d) What constitutes attendance by physician

2159 (c). Whether an applicant for life insurance has consulted a physician within the meaning of the application for the insurance depends upon the character of the interview.

National Americans v. Ritch, 121 Ark. 185, 180 S. W. 488; *New York Life Ins. Co. v. Franklin*, 118 Va. 418, 87 S. E. 584.

In *Valentini v. Metropolitan Life Ins. Co.*, 94 N. Y. Supp. 758, 106 App. Div. 487, it was held that consultation of a physician by insured's mother, with or without his knowledge, when he was not suffering from any ailment or disease, did not constitute a breach of warranty in a policy, in the application for which insured neglected to disclose such fact.

In *Modern Woodmen of America v. Wilson*, 107 N. W. 568, 76 Neb. 344, it was held that, in answer to a question in an application for life insurance calling for the names of the ailments for which assured had been treated and the names of his physicians, the assured is not required to give the name of every trifling ailment or of every physician he has consulted.

In *Modern Woodmen of America v. Miles*, 178 Ind. 105, 97 N. E. 1009, it was held that insured does not "consult" a physician, and is not "treated" for an "ailment," within the meaning of a question in his application for insurance, by merely stating to a physician that he has a headache and receiving medicine, without asking or receiving professional advice.

In *Hilts v. United States Casualty Co.*, 176 Mo. App. 635, 159 S. W. 771, failure of applicant to mention a visit to a physician who had performed an operation and who had requested applicant to return later for examination was held not to constitute false answer to question as to consulting a physician, although he mentioned to the physician a peculiar sensation which the evidence showed was one of the first signs of hernia.

In *Scofield's Adm'x v. Metropolitan Life Ins. Co.*, 64 Atl. 1107, 79 Vt. 161, 8 Ann. Cas. 1152, on the issue of the truth of insured's statement in his application for a life policy, that he had not consulted a physician, a physician testified that, prior to the making of the application, the insured consulted him with a view of being examined to determine whether he had a certain disease. No charge was made for the examination, and the physician did not advise the insured to do anything. It was held not to show the falsity of the statement.

In *National Council of the Knights and Ladies of Security v. Sealey* (Tex. Civ. App.) 162 S. W. 455, where it appeared that insured had only been given electric treatments for a stiff back, a denial that he had been treated by a physician for any disease within five years was held not a representation material to the risk, within Rev. Civ. St. 1911, art. 4834.

In *Harris v. Knights and Ladies of Honor*, 108 S. W. 130, 129 Mo. App. 163, it was held that where an applicant for membership in a fraternal benefit order, in answer to a question in a medical examination as to how long since he had been attended by a physician, stated that he had not been attended within five years, the fact that a physician removed some wax from his ear without being requested to do so, and when he was in the physician's office for another purpose, did not render his answer untrue.

In *Mutual Reserve Life Ins. Co. v. Dobler*, 137 Fed. 550, 70 C. C. A. 134, it was held that where insured answered certain questions with reference to when he last consulted a physician, the name of the physician, the reason, etc., by stating that he did not remember when he had consulted a physician, that it was years ago, the fact that on several occasions a physician who was a friend of insured, made physical examinations of him without charge, for the purpose of ascertaining his physical condition, on the physician's own initiative, and without finding any physical infirmity, and without his prescribing for insured, did not show that such answers were untrue.

In *Smith v. Travelers' Ins. Co.*, 135 N. Y. Supp. 18, 76 Misc. Rep. 441, it was held that a warranty in a health policy that insured has not consulted a physician in five years is not violated by a showing that insured, on making application to the board of education of a city for a leave of absence, attached thereto a certificate of a physician reciting that insured's illness within the five years

was influenza and tonsilitis, in the absence of any evidence that insured consulted the physician for the purpose of treatment.

In *Prudential Ins. Co. of America v. Lear*, 31 App. D. C. 184, it was held that the fact that the insured, in her application for a policy of life insurance, stated that she had not been "attended" by a physician except about two years before, while the evidence in the suit on the policy showed that she had "consulted" a physician during that period, will not defeat a recovery.

In *Beard v. Royal Neighbors of America*, 53 Or. 102, 99 Pac. 83, 19 L. R. A. (N. S.) 798, 17 Ann. Cas. 1199, it was held that where a benefit certificate issued on applicant's warranty that she had not consulted a physician, a call made by a physician at the instance of applicant's husband is a "consultation," within the meaning of the warranty, if she accepts his services and receives aid from him.

In *Bryant v. Metropolitan Life Ins. Co.*, 60 S. E. 983, 147 N. C. 181, it was held that, though a prescription given by a physician in response to a casual inquiry would not amount to being under the physician's care within the meaning of a statement in an application for life insurance that the applicant had not been "under the care of a physician" within two years, and though a prescription given after more careful examination as to an exceptional or isolated occurrence might not constitute the contemplated relationship, it is not necessary that the applicant should be bedridden to constitute being under a physician's care; but if the applicant, being apprehensive as to his condition, though "up and around," consulted a physician, and intrusted his case to him for regular or continuous treatment within the two years, the representation would be false, and would relieve the insurance company from obligations under the policy issued thereon.

2163-2165. (c) Same—Slight or temporary ailments

2163 (c). The general rule is that a false statement in an application for life insurance policies as to whether the applicant has been consulted or been treated by a physician is not material to the risk, if the treatment is for a trivial ailment.

Hoeland v. Western Union Life Ins. Co. of Spokane, 58 Wash. 100, 107 Pac. 866; *Prudential Life Ins. Co. of America v. Sellers*, 54 Ind. App. 326, 102 N. E. 894; *Mutual Life Ins. Co. of New York v. Mullan*, 107 Md. 457, 69 Atl. 385; *Modern Woodmen of America v. Miles*, 178 Ind. 105, 97 N. E. 1009; *Mutual Life Ins. Co. of New York v. Morgan*, 39 Okl. 205, 135 Pac. 279; *Mays v. New Amsterdam Casualty Co.*, 40 App. D. C. 249, 46 L. R. A. (N. S.) 1108;

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Yonda v. Royal Neighbors of America, 148 N. W. 926, 96 Neb. 730;
New York Life Ins. Co. v. Moats, 207 Fed. 481, 125 C. C. A. 143.
Contra are *Metropolitan Life Ins. Co. v. Brubaker*, 78 Kan. 146, 96
Pac. 62, 18 L. R. A. (N. S.) 362, 130 Am. St. Rep. 356, 16 Ann. Cas.
267; *Mutual Life Ins. Co. of New York v. Owen*, 111 Ark. 554, 164
S. W. 720.

To the same general effect are also the following cases:

Valentini v. Metropolitan Life Ins. Co., 94 N. Y. Supp. 758, 106 App.
Div. 487 (a nervous twitch); *Delvaux v. Metropolitan Life Ins.
Co.*, 172 Ill. App. 537 (eczema); *Prudential Ins. Co. of America v.
Sellers*, 54 Ind. App. 326, 102 N. E. 894 (cold); *Sargent v. Modern
Brotherhood of America*, 148 Iowa, 600, 127 N. W. 52 (tonsillitis,
headache, and stomach trouble, all of temporary character).

The reason for this general rule is that statements printed in an
application for insurance requiring disclosure in regard to such
matters must receive a reasonable interpretation.

Sargent v. Modern Brotherhood of America, 148 Iowa, 600, 127 N. W.
52; *Mays v. New Amsterdam Casualty Co.*, 40 App. D. C. 249, 46
L. R. A. (N. S.) 1108; *Hoeland v. Western Union Life Ins. Co. of
Spokane*, 58 Wash. 100, 107 Pac. 866.

In *Cole v. Mutual Life Ins. Co. of New York*, 56 South. 645, 129
La. 704, Ann. Cas. 1913B, 748, it was held that the fact that appli-
cant for reinstatement of life insurance had been treated by a phy-
sician for what was regarded as a common temporary inflamma-
tion of the throat did not constitute "consultation" of a physician
within a statement in the application that he had not consulted
a physician since a certain time, though it subsequently appeared
that applicant had tubercular laryngitis.

**2165-2167. (f) Statements as to family physician or usual medical
attendant**

2165 (f). In *Haughton v. Ætna Life Ins. Co. of Hartford*,
Conn., 42 Ind. App. 527, 85 N. E. 125, rehearing denied 42 Ind.
App. 527, 85 N. E. 1050, insured in an application was asked the
name and residence of his physician, "the one whom you have per-
sonally employed or consulted," to which he answered, "Have
none." In an action on the policy, it was found that he had pre-
viously personally consulted a physician, but had not "personally
employed a physician." It was held that the finding did not estab-
lish a breach of warranty in the answer to such question.

2168-2169. (h) Questions of practice—Evidence

2168 (h). In *Lynch v. Germania Life Ins. Co.*, 116 N. Y. Supp. 998, 132 App. Div. 571, it was held that, in an action on a life policy, an application by insured to another company, tending to contradict her statement as to not having consulted a physician, should have been received in evidence.

In *Kasprzyk v. Metropolitan Life Ins. Co.*, 140 N. Y. Supp. 211, 79 Misc. Rep. 263, it was held that, in determining the good faith of insured in stating that he had not been treated by a physician within a certain time, the question whether a physician, consulted by him under the belief that he was authorized to practice, was in fact licensed, was immaterial.

In *National Union v. Kelley*, 140 Pac. 1157, 42 Okl. 98, it was held that, in an action on a life policy, the burden is on the insurer to show a breach of insured's warranty that he had not had medical advice during the previous five years.

In *Kidder v. Supreme Commandery United Order of Golden Cross*, 78 N. E. 469, 192 Mass. 326, it was held that, when considering and answering questions involving insured's physical history in an application for life insurance, insured will be presumed to have been cognizant of her physical history within the period to which the inquiries were confined, as well as whether she had consulted or been treated by a physician.

In *Bullock v. Mutual Life Ins. Co. of New York*, 166 Mich. 240, 131 N. W. 574, it was held that defendant in an action on a life policy written prior to, and therefore unaffected by, the standard policy act (Pub. Acts 1907, No. 187), having given notice under the general issue that the application warranted the statements and answers of insured, and that shortly before the application he was treated for a certain disease by a certain doctor at a certain hospital, and that his answers to the medical examiner as to the diseases he had had, the physicians he had been treated by, and the hospitals he had been treated at made no mention thereof, its evidence that said doctor, at said hospital, treated him a number of times during the month preceding the application, made a prima facie showing of breach of the contract, imposing on plaintiff the duty of showing that such treatment was for some ailment not tending to weaken or undermine insured's health seriously.

In *Ladies of Maccabees of the World v. Kendrick* (Tex. Civ. App.) 165 S. W. 110, proof that decedent had been attended by a physician at a natural childbirth was held not to show that her neg-

ative answer to a question, "Have you consulted or been attended by a physician during the past five years?" was false.

In *Metropolitan Life Ins. Co. v. Goodman*, 65 South. 449, 10 Ala. App. 446, an action on a life policy providing that it should be void if insured was attended by a physician for any serious ailment before issuance, where it appeared that insured had been attended by a physician for treatment of syphilis, evidence was held insufficient to support a verdict that the risk was not thereby increased.

The sufficiency of the evidence relating to attendance by physicians was considered in the following cases:

Brunjes v. Metropolitan Life Ins. Co., 83 N. J. Law, 296, 84 Atl. 1062; *Fish v. Metropolitan Life Ins. Co.*, 64 Atl. 100, 73 N. J. Law, 619; *Mutual Life Ins. Co. of New York v. Mullan*, 69 Atl. 385, 107 Md. 457; *Thompson v. Metropolitan Life Ins. Co.*, 113 N. Y. Supp. 225, 128 App. Div. 420 (Sup.) reversing 99 N. Y. Supp. 1006; *Harris v. Knights and Ladies of Honor*, 108 S. W. 130, 129 Mo. App. 163; *Catholic Order of Foresters v. Collins*, 99 N. E. 745, 51 Ind. App. 285; *National Union v. Kelley*, 140 Pac. 1157, 42 Okl. 98; *Logan v. Court of Honor*, 153 S. W. 73, 168 Mo. App. 195.

2169-2170. (4) Same—Trial

2169 (i). In *Winn v. Modern Woodmen of America*, 137 S. W. 292, 157 Mo. App. 1, an instruction, requested by the defendant, was that if the insured talked with a doctor with regard to his health, and if the doctor gave the insured certain medicine for some ailment, the verdict should be for the defendant. Before giving the instruction the court changed the words "talked with" to "consulted." It was held, that this change was not improper, for "consulted," as used in this connection, means the same as "talked with," "consulted" meaning to apply for direction and information, while to "talk with" a physician and get medicine from him amounts to the same thing.

In *Kennedy v. Prudential Ins. Co. of America*, 177 Ill. App. 50, it was held that in an action on an insurance policy, where it is admitted that the insured made false answers as an inducement to the contract, instructions that the verdict should be for defendant if insured represented in her application that she had never undergone any surgical operation and falsely concealed such fact, and if it be found from the evidence that the representations were material to the risk and insured knew they were false when made, but, if it be found that the insured made truthful answers to the best of her

knowledge and belief, then the verdict should be for plaintiff, are erroneous.

In *Catholic Order of Foresters v. Collins*, 99 N. E. 745, 51 Ind. App. 285, a general verdict for plaintiff in an action on a fraternal benefit certificate was held not controlled by answers to special interrogatories showing merely a breach of warranty by insured as to prior medical advice.

In *Security Mut. Life Ins. Co. v. Calvert*, 87 S. W. 889, 39 Tex. Civ. App. 382, a policy of life insurance made the application a part thereof, in which insured warranted that she had not been attended by a physician and had not consulted one for 10 years. The application also provided that the policy should not be in force unless actually delivered to and accepted by insured during her lifetime, and while in good health. It was held, in an action on the policy, where there was undisputed evidence that insured had been attended by and had consulted a physician several times less than 10 years before the application was made, and that she was in bad health when the policy was delivered, it was error to submit these questions to the jury as issues in the case.

Whether insured had consulted with a physician other than the family physician contrary to the warranty in the application is under conflicting evidence for the jury.

Security Mut. Life Ins. Co. v. Calvert, 101 Tex. 128, 105 S. W. 320, reversing (Tex. Civ. App.) 100 S. W. 1033; *Dulany v. Fidelity & Casualty Co. of New York*, 66 Atl. 614, 106 Md. 17; *Smith v. Travelers' Ins. Co.*, 135 N. Y. Supp. 18, 76 Misc. Rep. 441; *Rigby v. Metropolitan Life Ins. Co.*, 93 Atl. 1079, 248 Pa. 351.

In *Kidder v. Supreme Commandery United Order of Golden Cross*, 78 N. E. 469, 192 Mass. 326, it was held that in an action on a benefit certificate, whether the risk was increased by alleged false answers to questions in the application relating to the consultation of physicians or of treatment by them was for the jury.

In *Pelican v. Mutual Life Ins. Co. of New York*, 119 Pac. 778, 44 Mont. 277, it was held that where insured represented that he had not suffered a surgical operation prior to making his application, and there was no controversy in the evidence that he had sustained an aspiration of his chest prior to that time, the court should have instructed as a matter of law that such treatment was a surgical operation and left it to the jury to determine insured's good faith.

21. EFFECT OF MISREPRESENTATION, BREACH OF WARRANTY, OR CONCEALMENT AS TO MATTERS RELATING TO FAMILY HISTORY OF INSURED

2171-2174. (a) Effect of false statement or concealment

2171 (a). Statements as to family history in an application for insurance are material to the risk, and preclude recovery, if false, whether regarded as representations or warranties.

Kasprzyk v. Metropolitan Life Ins. Co., 140 N. Y. Supp. 211, 79 Misc. Rep. 263; *Nedved v. Court of Honor*, 183 Ill. App. 390; *Hoagland v. Supreme Council, Royal Arcanum*, 61 Atl. 982, 70 N. J. Eq. 607; *Enright v. National Council, Knights and Ladies of Security*, 97 N. E. 681, 253 Ill. 460, reversing 161 Ill. App. 365.

In *Nedved v. Court of Honor*, 183 Ill. App. 390, it was held that, where answers to questions were intentionally false, the fact that the society had in its employ one whose duty it was to investigate the statements of applicants and make recommendations pertaining thereto cannot avail plaintiffs suing on the certificate, in absence of proof that the investigator obtained knowledge of the decedent's false statements. *Id.*

In *Schmidt v. Supreme Court, United Order of Foresters*, 228 Mo. 675, 129 S. W. 653, reversing judgment *Same v. United Order of Foresters*, 101 S. W. 625, 124 Mo. App. 165, it was held that a statement in an application for a benefit certificate that the applicant had no brothers and sisters when he had half brothers and sisters did not avoid the contract, especially in view of the statutory provision that no misrepresentation in procuring insurance shall avoid the policy unless the matter misrepresented shall have contributed to the contingency on which the policy is to become payable.

2174-2176. (b) Effect as dependent on knowledge and intent of applicant

2174 (b). No recovery can be had upon a life policy which is obtained by misrepresentation on the part of the insured as to the material representations affecting the risk, but where statements and answers were made by an applicant for insurance concerning matters of family history, in good faith, believing them to be true,

such answers or statements are not in all cases material, as a matter of law.

Bagby v. Court of Honor, 151 Ill. App. 371; Loesch v. Supreme Tribe of Ben Hur (Tex. Civ. App.) 190 S. W. 506; Citizens' Nat. Life Ins. Co. v. Swords, 68 So. 920, 109 Miss. 635.

In Keatley v. Grand Fraternity (D. C.) 198 Fed. 272, it is stated that under Act Pa. June 23, 1885 (P. L. 134), a breach of warranty of the truth of answers in an application for a life policy does not work a forfeiture, where the misrepresentation is made in good faith, and does not relate to a matter material to the risk.

In South Atlantic Life Ins. Co. v. Hurt's Adm'x, 79 S. E. 401, 115 Va. 398, it was held that fraud in obtaining life insurance was not established by untrue answers in the application failing to disclose that insured's uncle was afflicted with hereditary insanity, where the proof failed to show that insured knew that the insanity was hereditary and that the answers were willfully false.

In Nedved v. Court of Honor, 183 Ill. App. 390, it was held that answers to questions in an application for life insurance in a fraternal benefit society, made part of the certificate as to the number of brothers and sisters who are dead, and also whether death was from consumption, if not warranties, are material representations, and, being intentionally and knowingly false, will defeat a recovery on the certificate.

A statement by an applicant for life insurance as to the good health of one of his parents, is not a warranty, and the applicant does not insure the conformity of his opinion with actual fact, but warrants only his own bona fide belief and judgment.

Gilroy v. Supreme Court I. O. F., 75 N. J. Law, 584, 67 Atl. 1037, 14 L. R. A. (N. S.) 632; Daniel v. Modern Woodmen of America, 118 S. W. 211, 53 Tex. Civ. App. 570; Ranta v. Supreme Tent, Knights of Maccabees of the World, 107 N. W. 156, 97 Minn. 454.

In Kasprzyk v. Metropolitan Life Ins. Co., 140 N. Y. Supp. 211, 79 Misc. Rep. 263, it was held that misrepresentations by insured as to cause of death of brothers, who died of consumption, etc., were material, so as to avoid the policy whether knowingly made or not.

In Coplin v. Woodmen of the World, 62 South. 7, 105 Miss. 115, Ann. Cas. 1916D, 1295, unintentional misrepresentation by applicant for insurance as to the number of his brothers and sisters and the number dead was held not to avoid certificate, where the company

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and its examining physician were told that the applicant had been absent from home for years and knew little about his family history.

2176-2177. (c) Interpretation of answers as true or false

2176 (c). In *Keatley v. Grand Fraternity* (D. C.) 198 Fed. 272, an applicant for a life policy was held to make a fraudulent misrepresentation in the application deceiving insurer, where, in answer to questions, "Brothers," "Age, if living," "Age at death," etc., insured replied "No" to the first and left the others blank, though one had died, which insured knew; the question "Brothers" applying to brothers living or dead.

In *Blackstone v. Kansas City Life Ins. Co.*, 174 S. W. 821, 107 Tex. 102, where, as part of family history, application called for number of brothers, answer which apparently included the applicant as one of the brothers in the family was held not to invalidate the policy. It was held in the same case, overruling (Tex. Civ. App.) 143 S. W. 702, that failure of applicant for life insurance to include half-brothers and half-sisters in stating number of brothers and sisters living and dead held not to invalidate policy.

In *Doll v. Equitable Life Assur. Soc.*, 138 Fed. 705, 71 C. C. A. 121, it was held that where, in an application for life insurance, insured warranted that there was no history of consumption in his family, evidence that insured's sister had died of consumption prior to the date of the application, of which fact insured had knowledge, established a breach of such warranties.

2178. (d) Existence of hereditary disease

2178 (d). In *Claver v. Woodmen of the World*, 133 S. W. 153, 152 Mo. App. 155, it was held that the question, in an application for a death benefit certificate in a fraternal society, "Have any of your parents or grandparents, uncles or aunts, been subject to consumption, cancer, gout, scrofula, insanity, or any other hereditary disease," is intended to refer to only hereditary diseases, or diseases the tendency to contract which is hereditary; and is not intended to seek information as to insanity brought on by disease and senility, so that the answer "No" is truthful, notwithstanding the insanity of applicant's mother so brought on.

In *Iowa Life Ins. Co. v. Haughton*, 87 N. E. 702, 46 Ind. App. 467, it was held, reversing (Ind. App.) 85 N. E. 127, that insanity, in the question in an examination for life insurance as to whether insured's father had "insanity or other hereditary disease," refers to a

disordered mind from a diseased or defective brain, and not necessarily to a mere temporary mental disturbance during a weakened condition from typhoid fever.

In *South Atlantic Life Ins. Co. v. Hurt's Adm'x*, 79 S. E. 401, 115 Va. 398, a question in an application for life insurance as to whether any of the applicant's uncles or aunts had consumption or any hereditary disease was held to relate to physical condition and not to include hereditary insanity.

In *Supreme Lodge K. P. v. Bradley*, 132 S. W. 547, 141 Ky. 334, reversing judgment on rehearing 117 S. W. 275, an applicant for insurance stated in his application that neither he nor enumerated relatives, including sisters, had been affected with tuberculosis. The statements were warranted to be true. He knew that his sister had recently died of tuberculosis. It was held, that the statements were false on material matters, and were made fraudulently, so as to relieve insurer from liability.

2179-2181. (f) Questions of practice—Evidence

2179 (f). In *Schmidt v. National Council of Knights and Ladies of Security*, 176 Ill. App. 213, it was held that a finding, two years after an application to a fraternal benefit society, in an ex parte proceeding to confine the member in an asylum, that the member was then afflicted with hereditary insanity, but not finding the duration of the disease, is not admissible against the beneficiary on the question of a breach of warranty in a negative answer in the application as to whether any blood relatives had ever been afflicted with insanity.

In *Globe Mut. Life Ins. Ass'n v. Meyer*, 118 Ill. App. 155, it was held that where the answers in the application for insurance were in the handwriting of the medical examiner, and the answer to certain questions as to hereditary diseases was not in the bracket in which the questions were, nor opposite either of them, but opposite the blank space between them, without anything indicating that it was an answer to both of the questions, the court properly instructed that there was no statement in the medical examiner's report which could be properly considered as an answer to such question, and that they therefore should not find that any false statement had been made in such report to the question.

Sufficiency of the evidence to warrant sending the question to the jury or to direct a verdict was considered in the following cases: *Shannon v. Knights of the Maccabees*, 54 Pa. Super. Ct. 634; *Schmitt v. Michigan Mut. Life Ins. Co.*, 91 N. Y. Supp. 448, 101 App. Div. 12.

22. EFFECT OF MISREPRESENTATION, BREACH OF WARRANTY, OR CONCEALMENT AS DEPENDENT ON RELATION OF FACT MISREPRESENTED OR CONCEALED TO CAUSE OF LOSS

2182-2183. (a) Cause of death related to fact misrepresented or concealed

2182 (a). In *Gerlach v. Metropolitan Life Ins. Co.* (Sup.) 112 N. Y. Supp. 1095, it was held that under a provision in a life policy that the policy should be void if insured before its date had been treated for any serious disease, or had had any disease of the heart, kidneys, etc., and that the proofs of death should be evidence of the facts therein stated, no recovery could be had on the policy where it appeared from the proofs that insured had been previously treated for nephritis, and that delirium tremens and chronic nephritis were, respectively, the primary and secondary causes of the death; claimant certifying Bright's disease as the cause, and where such evidence was not contradicted.

In *Loehr v. Supreme Assembly of Equitable Fraternal Union*, 112 N. W. 441, 132 Wis. 436, it was held that, where inflammatory rheumatism was the remote cause of death, the certificate issued on the application was forfeited where the application failed to disclose that insured had had it three times, stating merely that insured had rheumatism once.

In *Hoffman v. Metropolitan Life Ins. Co.*, 131 N. Y. Supp. 588, 147 App. Div. 893, it was held that where a policy provided that it was void if before its date insured had had disease of the kidneys, and just prior to securing the insurance insured had been confined in a hospital on account of kidney trouble, and afterwards died from such disease, a judgment against insurer could not stand.

In *Marren v. North American Union*, 145 Ill. App. 375, it was held that the fact that one in becoming a member of a fraternal benefit society falsely represented that he was not addicted to the excessive use of intoxicating liquors will preclude recovery by the beneficiaries if his death resulted from the use of such liquors.

2183-2184. (b) Cause of death not related to fact misrepresented or concealed

2183 (b). Misrepresentations as to health or habits, being material to the risk, will avoid the policy, though the particular condi-

tion not disclosed did not cause, or even accelerate, the death of the insured.

Sargent v. Modern Brotherhood of America, 127 N. W. 52, 148 Iowa, 600; *Beard v. Royal Neighbors of America*, 53 Or. 102, 99 Pac. 83, 19 L. R. A. (N. S.) 798, 17 Ann. Cas. 1199; *Valleroy v. Knights of Columbus*, 116 S. W. 1130, 135 Mo. App. 574; *Mutual Life Ins. Co. of New York v. Mullan*, 69 Atl. 385, 107 Md. 457; *Provident Sav. Life Assur. Soc. v. Whayne's Adm'r*, 131 Ky. 84, 93 S. W. 1049; *Fidelity Mut. Life Ins. Co. v. Beck*, 104 S. W. 533, 84 Ark. 57, rehearing denied 104 S. W. 1102, 84 Ark. 57; *United Benev. Ass'n v. Baker* (Tex. Civ. App.) 141 S. W. 541; *Floyd v. Modern Woodmen of America*, 148 S. W. 178, 166 Mo. App. 166; *Ætna Life Ins. Co. v. Conway*, 75 S. E. 915, 11 Ga. App. 557.

The contrary rule has been followed in the following cases:

Herzberg v. Modern Brotherhood of America, 85 S. W. 986, 110 Mo. App. 328; *Goff v. Mutual Life Ins. Co. of New York*, 59 South. 28, 131 La. 98.

2185-2186. (d) Statutory provisions

2185 (d). In *Newton v. New York Life Ins. Co.*, 148 Pac. 619, 95 Kan. 427, under Gen. St. Kan. 1909, § 4200, misrepresentation of facts in an application will not defeat the insurance unless such facts pertain to the malady causing insured's death.

Under the Missouri statute (Rev. St. 1909, § 6937) a misrepresentation in the application that insured was then in good health would not avoid the policy unless he was then suffering from an infirmity which actually contributed to his death.

Harms v. Fidelity & Casualty Co. of New York, 157 S. W. 1046, 172 Mo. App. 241; *Dodt v. Prudential Ins. Co. of America*, 171 S. W. 655, 186 Mo. App. 168; *Roedel v. John Hancock Mut. Life Ins. Co.*, 176 Mo. App. 584, 160 S. W. 44; *Lynch v. Prudential Ins. Co. of America*, 131 S. W. 145, 150 Mo. App. 461; *Bruck v. John Hancock Mut. Life Ins. Co.*, 185 S. W. 753, 194 Mo. App. 529.

In *Frazier v. Metropolitan Life Ins. Co.*, 141 S. W. 936, 161 Mo. App. 709, it was held that a condition in a life insurance policy that the insurer assumed no obligation unless the insured was in sound health at the date the policy was issued is only a representation under this statute.

In *Lynch v. Prudential Ins. Co. of America*, 131 S. W. 145, 150 Mo. App. 461, it was held that the statute, cited as Rev. St. 1899, § 7890 (Ann. St. 1906, p. 3746), providing that no misrepresentation in obtaining a life policy shall be deemed material or avoid the policy

unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become payable, abrogates the distinction at common law between warranties and representations, and so applies to a warranty in the policy that unless insured was in sound health when the policy was issued, it should not take effect, as well as to misrepresentations in the application.

In *Salts v. Prudential Ins. Co.*, 120 S. W. 714, 140 Mo. App. 142, it was held that this statute, applied to the conditions and stipulations in the policy as well as to misrepresentations in the application, and hence though insured was not in sound health when the policy was delivered, it was not thereby avoided unless such ill health caused or contributed to her death.

In *Burns v. Metropolitan Life Ins. Co.*, 124 S. W. 539, 141 Mo. App. 212, it was held that under this statute the provisions of the policy that proof of the actual age of insured may be required with proofs of death, and the amount payable shall be the insurance which the premiums would have purchased at the true age, is void, though insured misstated his age in applying for the insurance.

Under this statute while the question whether matters misrepresented actually contributed to event on which policy was to become due is jury question, the statute is not intended to prevent court of equity from relieving against actual fraud (*Bruck v. John Hancock Mut. Life Ins. Co.*, 185 S. W. 753, 194 Mo. App. 529).

In *Valleroy v. Knights of Columbus*, 116 S. W. 1130, 135 Mo. App. 574, it was held that answers in an application for insurance in a fraternal benefit association, which under Rev. St. 1899, § 1408 (Ann. St. 1906, p. 1111), is not within the general laws, as to the health of an insured, are warranties, and, if untrue, avoid the policy, whether the matters misrepresented contributed to the death or not.

In *Thompson v. Royal Neighbors of America*, 133 S. W. 146, 154 Mo. App. 109, it was held that in absence of proof that defendant in an action on a death certificate was a benevolent association as contemplated by statute, it could not defend for misrepresentations by insured as to facts which did not contribute to the death; since it must be presumed to be governed by Rev. St. 1909, § 6937, providing that no misrepresentation made in obtaining an insurance policy shall avoid it unless the matter misrepresented actually contributed to the event on which the policy became payable.

In *Fishblate v. Fidelity & Casualty Co. of New York*, 53 S. E.

354, 140 N. C. 589, it was held that under 2 Revisal N. C. § 4646, providing that all statements in an application for insurance, or in the policy, shall be deemed representations and not warranties, and no representation, unless material or fraudulent, shall prevent a recovery on the policy, a representation in an application for accident insurance as to the physical condition of the insured is material where it would naturally affect the judgment of the insurer in accepting the risk, though the injury for which indemnity is claimed is not affected by the matter referred to in the representation.

In *United Benev. Ass'n v. Baker* (Tex. Civ. App.) 141 S. W. 541, it was held that under Acts 31st Leg., 1st Called Sess. c. 36, § 8, as amended by Acts 31st Leg. 2d Called Sess. c. 22, § 1, providing that all benefit certificates issued by fraternal associations shall be non-contestable on account of any statement or representation made unless material to the risk assumed, the term "risk assumed" must be taken to mean the hazard of the contract determined by the perils menacing the life of the insured, and hence a false representation that defendant had never had a certain practicably incurable disease was material to the risk and would avoid the policy which provided that a false answer to such question avoided the policy, even though the applicant died of a wholly different disease.

In *Royal Union Mut. Life Ins. Co. v. Wynn*, 177 Fed. 289, it was held that where insured was not an excessive drinker and his death was not caused by his use of intoxicants, his misstatement of the kind or quantity of liquors consumed daily, or his failure to state certain facts with reference thereto not material to the risk, was no defense to the policy, nor ground for voiding it, under Civ. Code Ga. 1895, §§ 2097-2099, 2101, regulating the effect of concealment and misrepresentations in an application for insurance.

2186-2187. (c) Questions of practice

2186 (c). In *Empire Life Ins. Co. v. Gee*, 55 South. 166, 171 Ala. 435, it was held that a plea averring that insured was at the time of his application for a life policy suffering from a disease of the aorta, without alleging that the disease increased the risk of loss, was insufficient for the court could not judicially know that every disease of the aorta increased the risk of loss; and the materiality of the statement as affecting the risk being for the jury.

In *Cunningham v. Modern Brotherhood of America*, 148 N. W.

918, 96 Neb. 827, it was held that the fact that insured, when making his application, had other ailments than the one causing his death, did not place upon the beneficiary the burden of showing that insured was sound as to the ailment causing his death.

The sufficiency of evidence was considered in *Supreme Lodge of the Fraternal Brotherhood v. Jones* (Tex. Civ. App.) 143 S. W. 247.

In *Stegner v. Modern Brotherhood of America*, 123 N. W. 842, 24 S. D. 371, it was held that where both parties went to trial upon the assumption that the burden of proof rested upon plaintiff to show that the death of deceased was not caused directly or indirectly by pregnancy, or anything growing out of it or connected therewith, and it was shown by evidence for plaintiff that the immediate cause of her death was acute dilatation of the heart resulting from over-exertion too soon after childbirth, a verdict should have been directed for defendant.

In *Barker v. Metropolitan Life Ins. Co.*, 84 N. E. 490, 198 Mass. 375, it was held that where insured, who had warranted at the time of his application that he never had any disease of the kidneys, died shortly thereafter of kidney disease, but there was evidence that at the date of the policy he did not have such disease and was in sound health, and that he either made no misstatements in his application or, if he did, that they were not made with actual intent to deceive, and that the matters misstated did not increase the risk of loss, as required by Rev. Laws, c. 118, § 21 (St. 1907, p. 854, c. 576, § 21), in order to defeat a recovery on the policy, the court properly declined to order a verdict for defendant.

By express provision of Rev. St. 1899, § 7890 (Ann. St. 1906, p. 3746), whether the matter misrepresented in obtaining a life policy contributed to the contingency or event on which the policy became payable, so as to avoid it, is for the jury.

Keller v. Home Life Ins. Co., 95 S. W. 903, 198 Mo. 440; *Lynch v. Prudential Ins. Co. of America*, 131 S. W. 145, 150 Mo. App. 461; *Roedel v. John Hancock Mut. Life Ins. Co.*, 160 S. W. 44, 176 Mo. App. 584.

In *Roedel v. John Hancock Mut. Life Ins. Co.*, 160 S. W. 44, 176 Mo. App. 584, evidence in an action on a life policy was held to make it a jury question whether insured was in good health as represented in his application at the time the policy was issued.

In the same case it was held that an instruction that, to avoid a life policy for a misrepresentation in the application that insured was in

good health, any misrepresentation must not only have been with respect to a matter which contributed to his death, but must have been made with knowledge of its falsity, was not erroneous to defendant's prejudice.

In *Coscarella v. Metropolitan Life Ins. Co.*, 157 S. W. 873, 175 Mo. App. 130, it was held that under Rev. St. 1909, § 6937, requiring submission to the jury of the question whether misrepresentations as to health are as to facts which contributed to the death of the insured, it was proper to submit to the jury the question whether the condition of health of the insured at the date of the policy contributed to her death, in an action upon a policy providing that there should be no obligation unless the insured was in good health at the date of the policy.

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XIII. FORFEITURE OF CONTRACT FOR BREACH OF PROMISSORY REPRESENTATIONS OR WAR- RANTIES OR CONDITIONS SUBSEQUENT—LIFE AND ACCIDENT INSURANCE

1. NATURE OF PROMISSORY WARRANTIES AND REPRESENTA- TIONS AND CONDITIONS SUBSEQUENT

2189-2190. (a) Definition

2189 (a). In *Metropolitan Life Ins. Co. v. Goodman*, 65 South. 449, 10 Ala. App. 446, it was stated that warranties are of two kinds, affirmative and promissory, both of which may be either express or implied, the first relating to the existence of some fact before the making of the policy, and the latter to the happening of some future event or the performance of some future act. It was held in the same case that where an insured accepted a life policy providing that it should be void if, before delivery of the policy, he had been attended by a physician for any serious complaint, he impliedly warranted that he was not so attended by any physician.

2197-2199. (g) Conditions subsequent

2197 (g). In *Eureka Life Ins. Co. v. Hawkins*, 39 App. D. C. 329, it was held that forfeitures, which are the result of technical provision in contracts of insurance in the nature of conditions subsequent, are not looked upon favorably by the courts, especially in the case of so-called industrial policies issued to illiterate persons.

2. GROUNDS OF FORFEITURE IN GENERAL

2199-2207. (a) In general

2199 (a). Forfeitures of life insurance policies are not favored, and will not be enforced against equity and good conscience.

Peterson v. National Council of Knights and Ladies of Security, 175 S. W. 284, 189 Mo. App. 662; *Independent Order of Foresters v. Cunningham*, 127 Tenn. 521, 156 S. W. 192.

In *Supreme Ruling of the Fraternal Mystic Circle v. Turner*, 105 Miss. 468, 62 South. 497, it was held that under Code 1906, § 2636, benefit insurance society was not entitled to rely on violations of its laws and regulations as defenses to a suit on a certificate,

where it had not filed its laws and regulations with the commissioner of insurance and banking.

In *Baker v. Modern Woodmen of America*, 121 S. W. 794, 140 Mo. App. 619, it was held that within the certificate of insurance and by-laws of a beneficiary society, providing that the certificate shall be void if insured be "convicted" of a felony, there was no conviction though he was tried for a felony, verdict was returned against him, and sentence of imprisonment imposed, appeal having been granted him, supersedeas bond having been approved, and he having been let to bail, with the result, under Rev. St. 1899, § 2698 (Ann. St. 1906, p. 1590), of suspending enforcement of sentence and judgment, and he having died pending action on the case by the Supreme Court, the "abatement" by his death not being simply of the appeal, but of the prosecution and the liability to prosecution, leaving the case as though no prosecution had ever been entered against him.

A similar result was reached in *Woodmen of the World v. Dodd*, (Tex. Civ. App.) 134 S. W. 254. In this case it was held that, where a benefit certificate provided for forfeiture if a member was convicted of a felony, the policy was not forfeited where insured died pending a motion for rehearing on appeal from a conviction of manslaughter, under Code Cr. Proc. art. 884, providing that the judgment of conviction if suspended does not become final while an appeal remains undetermined, and Penal Code, art. 27, declaring that an accused person is a convict only after final condemnation by the court of last resort to which it may have been thought proper to appeal.

2201-2202. (b) Assignment of policy

2201 (b). In *Clark v. Woods Nat. Bank*, 113 S. W. 335, 52 Tex. Civ. App. 38, it was held that insurer having waived the requirements of a life policy as to the form of an assignment of the policy by insured to secure a debt, no one else could attack the form.

2202-2203. (c) Other insurance

2202 (c). A provision of a policy, limiting the right to take out other insurance is not one providing for diminished payment, but for avoidance of the policy if there should be other insurance in excess of the amount stipulated (*Life Ins. Co. of Virginia v. Fitzgerald*, 85 S. E. 913, 143 Ga. 725). So a condition requiring notice of additional insurance is not complied with by notice of a mere

intention to take out other insurance in the future (*Anderson v. Interstate Business Men's Accident Ass'n of Des Moines, Iowa*, 160 N. W. 522, 38 S. D. 105).

In *Geronime v. German Roman Catholic Aid Ass'n of America*, 149 N. W. 291, 127 Minn. 247, a death benefit certificate providing that obligations thereunder should cease if the member belonged to a secret, non-Catholic aid association is not forfeited by his membership in a secret aid society open to Roman Catholics and not disapproved by that church.

2203-2205. (d) Termination of membership in mutual benefit association

2203 (d). In *International Order of Twelve Knights & Daughters of Tabor v. Wilson* (Tex. Civ. App.) 151 S. W. 320, it was held that where a member of a fraternal organization was not in good standing at the time of his death in the only subordinate temple to which he belonged, or could belong, there could be no recovery on the certificate.

In *Edgerly v. Ladies of the Modern Maccabees*, 151 N. W. 692, 185 Mich. 148, it was held that where a member of a fraternal benefit society has voluntarily dropped her insurance certificate and been suspended under the terms thereof, she has no vested right to notice of the subsequent acts of the order affecting insurance certificates.

In *Odd Fellows Ben. Ass'n v. Ivy*, 62 South. 423, 105 Miss. 423, suspension of member of benefit insurance society for betraying the secrets of the order, not shown to have been irregular, was held to defeat a recovery on the benefit certificate, where the defendant made no effort by appeal or otherwise to obtain reinstatement.

In *Supreme Tribe of Ben Hur v. Miller*, 122 Ill. App. 489, it was held that, where the by-laws of a fraternal insurance society provide that a member who takes his own life becomes ipso facto suspended from membership, another by-law providing that no suspension shall be on mere rumor, without investigation or trial, has no application.

In *Wilcox v. Supreme Council of Royal Arcanum*, 136 N. Y. Supp. 377, 151 App. Div. 297, reversing order 123 N. Y. Supp. 83, 66 Misc. Rep. 253, it was held that where a member of a benefit association was wrongfully expelled, and carried his appeal within the order as far as possible, and died before he could bring to trial mandamus proceedings to compel his reinstatement, the judgment of expulsion was not conclusive against the beneficiary.

A by-law which provides that, in case the funeral services of a deceased member are conducted by a nonorthodox priest, the death benefits are forfeited, will not be enforced, where the wife of a deceased member in good standing applies to the only orthodox priest in the neighborhood to conduct the services, and upon his refusal calls in an unorthodox priest who conducts the funeral (*Telech v. Orthodox Catholic Mut. Aid Soc. of America*, 63 Pa. Super. Ct. 207).

3. CHANGE IN OCCUPATION OR ENTERING PROHIBITED OCCUPATION OR MILITARY SERVICE

2205-2207. (a) Continuing warranties or conditions as to occupation

2205 (a). In *Brittenham v. Sovereign Camp Woodmen of the World*, 167 S. W. 587, 180 Mo. App. 523, it was held that under Acts 1911, p. 286, § 9, a certificate issued by a fraternal insurer is void without action by insurer, where the member did not comply with the by-laws requiring members to give notice before engaging in prohibited occupations and to pay an additional premium. It was stated in the same case that where a member of a fraternal insurance order, who engaged in a prohibited occupation, did not give the notice and pay the additional premiums necessary to prevent forfeiture, recovery cannot be had under a by-law providing that payment of a certificate in force for five years should not be contested save on specific grounds, where, at death, a member was in good standing.

In *Zeman v. North American Union*, 105 N. E. 22, 263 Ill. 304, affirming judgment 181 Ill. App. 551, it was held that a by-law of a fraternal benefit association providing that no benefits should be paid on account of the death of a member while engaged in a prohibited occupation, either as the direct or indirect result thereof, does not apply where the member had retired from such occupation several months before his death.

In *McCarthy v. Pacific Mut. Life Ins. Co.*, 178 Ill. App. 502, it was held that a stipulation in an insurance policy is valid which provides that in case insured shall change his occupation the "latest" manual of the company shall be referred to, to determine whether the newly adopted occupation is more hazardous and what amount of indemnity is the basis of liability.

In *Gienty v. Knights of Columbus*, 92 N. E. 111, 199 N. Y. 103, 20 Ann. Cas. 928, reversing judgment 110 N. Y. Supp. 1129, 126 App. Div. 934, a member of a beneficial association agreed in his

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application to respect the regulations with reference to occupation. Under the space wherein he signed his name was a statement, "See other side for hazardous risks," and on the other side was a list of occupations classified as extrahazardous, which list did not include the occupation of a switchman. Prior to the application the order had adopted a by-law making the occupation of switchman extrahazardous. It was not shown that the applicant ever knew of the by-law. It was held that there was no forfeiture because insured, after the issuance of the certificate, engaged in the occupation of a switchman, in violation of his obligations under the certificate.

In *Mathews v. Modern Woodmen of America*, 236 Mo. 326, 139 S. W. 151, Ann. Cas. 1912D, 483, it was held that as the agreement and the policy was to be construed strictly against the insurer, under the language used, the policy was not forfeited by engaging in a prohibited occupation unless death resulted therefrom.

The same principle was applied in *Gardner v. Metropolitan Life Ins. Co.*, 114 N. E. 717, 225 Mass. 439, holding that the word "leave" should be construed to mean "voluntarily leave," and the condition did not apply if the insured was arbitrarily and without justifiable cause discharged.

2207-2208. (b) What constitutes change in occupation

2207 (b). Within a warranty, in an application for beneficial insurance, as to applicant's occupation, one who has once had and followed an occupation continues to have it till he has abandoned it, either by quitting work in it without intention or ability to resume it, or by engaging in some other occupation not of a mere temporary character.

Supreme Lodge Knights and Ladies of Honor v. Baker, 50 South. 953, 163 Ala. 518; *Ætna Life Ins. Co. v. Dunn*, 138 Fed. 629, 71 C. C. A. 79; *Taylor v. Illinois Commercial Men's Ass'n of Chicago*, 122 N. W. 41, 84 Neb. 799, 24 L. R. A. (N. S.) 1174; *Everson v. General Fire and Life Assur. Corp., Ltd., of Perth, Scotland*, 88 N. E. 658, 202 Mass. 169.

In *Ætna Life Ins. Co. v. Dunn*, 138 Fed. 629, 71 C. C. A. 79, it was held that the term "occupation" as used in an accident policy implies simply that which at the time of the accident constitutes assured's principal business or pursuit.

In *Everson v. General Fire & Life Assur. Corp., Limited, of Perth, Scotland*, 88 N. E. 658, 202 Mass. 169, it was held that where the employment of insured is narrow, and classification is strict and

closely subdivided, change from one class of compensated work to another may effect a change of occupation, but, where comprehensive phraseology is used, a slight variation from daily routine does not change the main purpose of his business activity.

In *Simmons v. Western Travelers' Acc. Ass'n*, 112 N. W. 365, 79 Neb. 20, a condition in the constitution of an accident insurance company provided for a limitation of liability if any member of the association shall change his occupation to one classed as more hazardous than that stated in his original application. Insured, a traveling man, lost his position, and thereafter lived on his father's ranch, but was paid no salary. He was endeavoring to obtain another situation as commercial traveler when killed. It was held that he had not changed his occupation to that of stock farmer, owner, or superintendent, classed by the executive board as more hazardous than that of commercial traveler.

In *Ætna Life Ins. Co. v. Dunn*, 138 Fed. 629, 71 C. C. A. 79, it was held that the fact that insured, who had taken out an accident policy, gave his occupation as druggist, and that some time after the loss of his drug store by fire he was engaged in collecting a claim for loss of a policy of insurance on the drugs, and attended to the collection of accounts connected therewith, and intended to resume business after he had sufficiently improved his homestead and occupied it for a sufficient length of time to enable him to sell his homestead, did not have the effect to continue during such time his occupation as a druggist, or affect the designation of his occupation while improving his homestead as that of supervising farmer.

In *Batten v. Modern Woodmen of America*, 111 S. W. 513, 131 Mo. App. 381, a benefit certificate forbade insured to engage in the employment of a railroad switchman, or of a car coupler on all trains except air-brake trains, and provided that a person should be held to be engaged in either of such occupations if the duties of his employment required him occasionally or continuously to perform any of the duties of such occupations. Insured, as one of a gang of laborers, was doing common labor about railroad shops. In aid of their labor they used a small engine operated by one man, but they did not work in the switchyards, or engage in the switching and braking attendant on the making up or breaking up of trains. At the time of his death insured and another, who was in charge of the engine, were moving a "dead engine" by pushing it into the shop, insured riding on the latter engine, and by some unknown means he fell off and was crushed. It was held that insured was

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not a railroad switchman, or a car coupler, nor did the duties incident to his employment require him "to perform any of the work or duties of, or incident to," such occupations, within the meaning of the certificate.

2208-2211. (c) Same—Occasional or temporary acts or duties

2208 (c). In *Butler v. Supreme Court*, I. O. F., 110 Pac. 1007, 60 Wash. 171, it was held that to visit a mine does not work a forfeiture under a benefit certificate containing a prohibition against "engaging in prospecting" or "mining."

In *Southern Ins. Co. v. Anderson*, 172 S. W. 318, 130 Tenn. 482, Ann. Cas. 1916B, 737, occasional diving by the foreman of a bridge construction crew was held not to be a change of occupation, within an accident insurance policy.

Similarly, act of setting off single fire-work is not change of occupation from that of gardener to that of user or handler of fire-works, within provision of accident policy (*Bulkeley v. Brotherhood Accident Co.*, 101 Atl. 92, 91 Conn. 727).

In *Montgomery v. Continental Casualty Co.*, 59 South. 907, 131 La. 475, it was held that one insured as a "draftsman with office and traveling duties only" was performing an act pertaining to the occupation of "machinist," a more hazardous occupation, when injured, while operating a press drill for recreation, so as to limit the amount of his recovery as provided in the policy.

2212-2214. (c) Engaging in prohibited occupation

2212 (c). Merely engaging in a prohibited occupation forfeits a benefit certificate under a by-law or contract in terms forfeiting it ipso facto in such event; the provision as to forfeiture being self-executing.

Schwanekamp v. Modern Woodmen of America, 120 Pac. 806, 44 Mont. 526; *Quinn v. North American Union*, 162 Ill. App. 319; *Mutual Protective League v. Langsdorf*, 126 Ill. App. 572; *Garrity v. Catholic Order of Foresters*, 148 Ill. App. 169, judgment affirmed 90 N. E. 753, 243 Ill. 411.

Where a member has bound himself to be subject to the by-laws of the fraternal association at the time he became a member, and all by-laws thereafter enacted, if he thereafter engages in an occupation expressly prohibited by the by-laws, he thereby incurs the penalty of having his certificate suspended until he has refixed his status by a compliance with the by-laws of the association in such

case made and provided (*Fraternal Aid Ass'n v. Hitchcock*, 121 Ill. App. 402). The violation of the condition in an application for a life policy which provided against insured engaging in extrahazardous occupations for one year was only to suspend the policy which was revived at the expiration of the year (*Edmonds v. Mutual Life Ins. Co. of New York*, 144 N. W. 718, 33 S. D. 55, 50 L. R. A. (N. S.) 592).

In *Abell v. Modern Woodmen of America*, 105 N. W. 65, 96 Minn. 494, reargument denied 105 N. W. 906, 96 Minn. 494, it was held that, where a mutual benefit certificate provides that if the member shall engage in any occupation prohibited by the by-laws the certificate shall become void as to any claim on account of the death of a member traceable to such occupation, the insurer is exempted from all liability for death by accident or disease directly traceable to such prohibited occupation; but the certificate remains in full force, except as to the hazard of such occupation.

2214-2215. (f) Same—Engaging in the sale of intoxicating liquors

2214 (f). Where the application to a fraternal benefit society stated that the applicant was not engaged in the sale of liquors, and would not thereafter engage in that business, and the certificate and by-laws provided that the certificate should be void if insured thereafter engaged in the sale of liquors, the benefit certificate was rendered void by insured thereafter engaging in the sale of malt or intoxicating liquors.

Modern Woodmen of America v. Lynch (Tex. Civ. App.) 141 S. W. 1055;
Pauley v. Modern Woodmen of America, 87 S. W. 990, 113 Mo. App. 473; *Hexom v. Knights of Maccabees of the World*, 140 Iowa, 41, 117 N. W. 19; *Schutte v. Kibler*, 55 Pa. Super. Ct. 199.

A warranty in a life policy that insured would not "engage" in any of the extrahazardous "occupations" or employments named, including that of retailing intoxicating liquors, was violated by ownership of an interest in a retail liquor business, though insured did not physically participate in the business.

Ostmann v. Supreme Lodge, Knights and Ladies of Honor, 85 N. J. Law, 86, 88 Atl. 949; *Rauber v. Mutual Life Ins. Co. of New York*, 156 App. Div. 446, 141 N. Y. Supp. 997; *Graves v. Knights of the Maccabees of the World*, 92 N. E. 792, 199 N. Y. 397, 139 Am. St. Rep. 912, reversing judgment 112 N. Y. Supp. 948, 128 App. Div. 660.

In *Supreme Council of Royal Arcanum v. Urban*, 137 Ill. App. 292, however, it was held that a by-law which excludes from benefits the beneficiaries of a member who is a "barkeeper or other person who sells or serves intoxicating liquors" does not exclude one who is engaged in the business of selling intoxicating liquors without himself selling or serving them.

In *Bracket v. Modern Brotherhood of America*, 157 S. W. 690, 154 Ky. 340, 45 L. R. A. (N. S.) 1144, it was held that for an insured to assist in bottling aged whisky, where the operations were conducted in a government warehouse, will not avoid a certificate of life insurance issued by a mutual benefit association whose by-laws provided that the certificate of any member engaged in the manufacture or sale of intoxicating liquors was and should be void.

In *Supreme Tribe of Ben Hur v. Lennert*, 98 N. E. 115, 178 Ind. 122, overruling judgment (App.) 94 N. E. 889, which on rehearing affirmed 93 N. E. 869, it was held that the fact that insured drove a beer wagon, and took orders from dealers, and delivered to them, and did collecting, did not constitute the "sale as a beverage" within a by-law avoiding certificate of one engaged in the sale of liquors as a beverage.

Decedent, who had not been employed or received compensation as a saloon bartender, though he occasionally waited upon customers of a saloon as an accommodation to the proprietor, was not a "saloon bartender" within prohibitive provision of his contract with mutual benefit insurance society.

Modern Woodmen of America v. Berry, 161 N. W. 534, 100 Neb. 820;
Stevens v. Modern Woodmen of America, 107 N. W. 8, 127 Wis. 606, 7 Ann. Cas. 566.

However, in *Modern Woodmen of America v. Lynch* (Tex. Civ. App.) 141 S. W. 1055, it was held that, if insured was engaged in performing duties incident to the sale of intoxicants when he died, prohibited by the certificate and by-laws of the society, the fact that he received no compensation, would not prevent the forfeiture of the certificate pursuant to its provisions.

In *Clark v. Modern Woodmen of America*, 156 S. W. 72, 170 Mo. App. 210, it was held that a fraternal benefit certificate, which provides that it shall be void if the member engages in the liquor business, issued on an application wherein the member stated that he was not engaged in such business and would not become so, and that he understood and agreed that the society did not indemnify against death resulting from occupations prohibited by its by-laws

is enforceable, though the member became engaged in such business and continued until his death, where it did not result from the occupation.

2215-2217. (g) Same—Effect of subsequent by-laws

2215 (g). Where, at the time a member joined a beneficial insurance association, its by-laws did not prohibit him from engaging in the liquor business, an amendment thereafter to that effect, when he was in good standing and without his consent, would not deprive him and his beneficiary of their vested rights under his certificate.

Barrett v. Grand Lodge A. O. U. W. of State of New York, 117 N. Y. Supp. 125, 63 Misc. Rep. 429; *Grand Lodge, A. O. U. W. v. Hadlock*, 82 Pac. 583, 72 Kan. 35, 1 L. R. A. (N. S.) 1064; *Haley v. Supreme Court of Honor*, 139 Ill. App. 478.

In *Grand Lodge A. O. U. W. v. Oetzel*, 139 Ill. App. 4, it was held that a by-law, providing that no person shall be admitted to membership who is engaged in the sale of intoxicating liquors, and any member who shall after a date specified enter into the business shall stand suspended and his certificate becomes void, was intended to prevent members not already engaged in the saloon business from entering the same, but did not apply so as to preclude re-engagement therein of one temporarily forced to abandon business in which he was engaged at the time of the adoption of the by-law.

In *Ayers v. Grand Lodge A. O. U. W. of State of New York*, 80 N. E. 1020, 188 N. Y. 280, affirming 109 App. Div. 919, 95 N. Y. Supp. 1112, it was held that, when insured joined a mutual benefit society, the contract did not contain any restriction as to business or occupation. Afterwards the society adopted a by-law suspending from membership those engaging in the business of selling intoxicating liquor as a beverage. In an action on the certificate, where the defense was that insured had gone into the liquor business, and therefore forfeited his membership, held, that the society under a general power reserved to amend its by-laws had no authority to adopt an amendment which would deprive the insured of a vested right which he acquired by the contract.

Where an application for a benefit certificate in a fraternal association contained an agreement to comply with all the laws and regulations which may be thereafter enacted as condition to the right to participate in the benefits and privileges of the order, a law of the order subsequently adopted that any member of the order who shall after a certain date become a saloonkeeper shall be

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expelled and making provision for suspension from rights in the beneficiary fund and rendering the certificate void is valid and binding on one who obtained a certificate under such an application.

Strang v. Camden Lodge, A. O. U. W., 64 Atl. 93, 73 N. J. Law, 500; *Glenty v. Knights of Columbus*, 110 N. Y. Supp. 1129, 126 App. Div. 934, affirming 105 N. Y. Supp. 244, 55 Misc. Rep. 98.

4. BREACH OF CONDITION AS TO TRAVEL OR RESIDENCE IN PROSCRIBED REGIONS

2221. (b) What constitutes residence within proscribed regions

2221 (b). In *Laue v. Grand Fraternity*, 132 Tenn. 235, 177 S. W. 941, L. R. A. 1915F, 1056, Ann. Cas. 1917A, 376, it was held that under provisions of constitution made part of benefit certificate, certificate was not forfeited by member's temporary sojourn outside the territory to which residence was restricted.

5. EXCESSIVE USE OF INTOXICATING LIQUORS OR NARCOTICS

2229-2232. (a) Continuing warranties and conditions as to habits

2229 (a). In *Galvin v. Knights of Father Mathew*, 155 S. W. 45, 169 Mo. App. 496, a pledge by a member of a benefit insurance society to abstain from intoxicating drink was held to be in the nature of a warranty requiring strict compliance as an essential condition to the preservation of his rights under the benefit certificate.

2232-2233. (b) What constitutes breach of warranty or condition

2232 (b). In *Schon v. Modern Woodmen of America*, 99 Pac. 25, 51 Wash. 482, it was held that insured was not "intemperate" within a provision of a benefit certificate that it should become void if insured should become intemperate in the use of alcoholic liquors, even if he drank liquors to excess upon exceptional occasions, unless he was addicted to periodical indulgences, which became habitual.

In *Evans v. Modern Woodmen of America*, 129 S. W. 485, 147 Mo. App. 155, it was held that, where a mutual benefit certificate provided for forfeiture in case insured should become intemperate in the use of intoxicating liquors, the word "intemperate" should be held to mean, not the excessive or habitual use of intoxicating liquors, but the habitually excessive use thereof.

So the words "excessive or intemperate use of intoxicants," as

used in a benefit certificate precluding recovery if the member became addicted to such use, referred to a case where the member's condition in such respect was of such nature as to impair his health, mental faculties, or otherwise render the risk more hazardous (*Wising v. Brotherhood of American Yeomen*, 156 N. W. 247, 132 Minn. 303).

2233 (b). A mutual benefit life insurance policy not collectable if death be caused by intemperance is not avoided where insured drank a reasonable amount in good faith for medical purposes, though he was made drunk and died as a result (*Kidd v. National Council of Junior Order of United American Mechanics of United States*, 193 S. W. 130, 137 Tenn. 398).

In *Sovereign Camp of Woodmen of the World v. Hutchins*, 134 Pac. 1116, 39 Okl. 267, it was held that, under a beneficiary's certificate providing that it shall be void in case insured becomes "so intemperate from the use of intoxicating liquor as to produce delirium tremens," the right to the insurance is forfeited where insured gets delirium tremens from drinking intoxicating liquors, though he was not suffering from delirium tremens at the time of his death, and though his death did not result directly from drinking intoxicating liquors.

2235-2236. (d) Same—Impairment of health

2235 (d). In *Robertson v. Fraternal Union of America*, 67 S. E. 247, 85 S. C. 221, a policy of life insurance provided that it should be void if insured died "from disease resulting from his intemperate habits * * * or from the result of drunkenness," or if he "shall become so far intemperate or use drugs to such an extent as to impair his health." It was held that it was a breach of the latter part of this condition that insured became so far intemperate as to impair his health, even though the impairment of health was not the direct and proximate cause of death.

6. EFFECT OF BREACH OF PROMISSORY WARRANTY OR CONDITION SUBSEQUENT

2237-2238. (a) The general rule

2237 (a). In *Modern Woodmen of America v. Weekley*, 139 Pac. 1138, 42 Okl. 25, it was held that the condition of a fraternal benefit certificate that the entering on any of specified hazardous occupations should limit or extinguish the insurer's liability pursuant to its by-laws was reasonable and binding.

In *Mathews v. Modern Woodmen of America*, 139 S. W. 151, 236 Mo. 326, Ann. Cas. 1912D, 483, it was held that Rev. St. 1899, § 7890, providing that no misrepresentation made in obtaining a policy shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event in which the policy became due or payable, does not cover promises referring to the future, and to be kept or broken after the policy takes effect.

In *Knapp v. Brotherhood of American Yeomen*, 105 N. W. 63, 128 Iowa, 566, it was held that, where there are three separate warranties in a certificate issued by a fraternal beneficiary association, the breach of any of them will defeat a recovery on the certificate.

In *Britt v. Sovereign Camp of Woodmen of the World*, 134 S. W. 1073, 153 Mo. App. 698, it was held that, when a forfeiture is claimed by a fraternal benefit association, forfeiture must be based on the violation by the the member of a precise condition laid down in the contract.

2238-2239. (b) Qualification of rule

2238 (b). In *United States Benev. Soc. v. Watson*, 84 N. E. 29, 41 Ind. App. 452, it was held that conditions in an insurance policy tending to work a forfeiture of the policy will be construed most strongly against the insurer, and most favorably toward those against whom they are meant to operate.

The rule that the law abhors a forfeiture and will relieve against it when possible applies to membership certificates issued by beneficial associations.

Burchard v. Western Commercial Travelers' Ass'n, 123 S. W. 973, 139 Mo. App. 606; *Walton v. Fraternal Aid Ass'n*, 130 S. W. 1124, 149 Mo. App. 493; *Leech v. Order of R. Telegraphers*, 109 S. W. 811,

130 Mo. App. 5; *Morgan v. Independent Order of Sons and Daughters of Jacob of America*, 44 South. 791, 90 Miss. 864.

Forfeitures of insurance are unfavorably regarded, and courts of equity will not enforce them and will often relieve against them, and courts of law will not permit them to take effect under the provisions of a contract, unless the party asserting the forfeiture has complied with all the conditions upon which it depends (*Bange v. Supreme Council Legion of Honor of Missouri*, 105 S. W. 1092, 128 Mo. App. 461). So, too, forfeiture of an insurance policy will not be declared, where the insured has acted thereon in good faith and paid all the dues required, and insurer has not been injured by any act of insured, nor unless there is a clear case of violation of good faith with the insurer (*Morgan v. Independent Order of Sons and Daughters of Jacob of America*, 44 South. 791, 90 Miss. 864).

2239-2240. (c) Same—Necessity of provisions for forfeiture

2239 (c). Unless the circumstances show a clear intention to declare a forfeiture it will not be enforced (*Lane v. Yeomen of America*, 125 Ill. App. 406).

Where the by-laws of the company were expressly made part of the contract by a life policy, they providing that a proceeding must be had to forfeit the policy for the making of false statements in the application, such policy was not forfeited for such false statements, in the absence of any proceeding to that end (*Jennings v. National American* [Mo. App.] 179 S. W. 789).

2242-2244. (f) Effect of breach of condition as dependent on relation to cause of death

2242 (f). Where a mutual benefit certificate provides that if the member shall engage in any occupation prohibited by the by-laws the certificate shall become void as to any claim on account of the death of a member traceable to such occupation, the insurer is exempted from all liability for death by accident or disease directly traceable to such prohibited occupation, but the certificate remains in full force except as to the hazard of such occupation.

Modern Woodmen of America v. Talbot, 107 N. W. 790, 78 Neb. 621;
Modern Woodmen of America v. Weekley, 139 Pac. 1138, 42 Okl. 25;
Abell v. Modern Woodmen of America, 105 N. W. 65, 96 Minn. 494,
 reargument denied 105 N. W. 906, 96 Minn. 494.

Where a mutual benefit certificate provided that it should be void if assured engaged in liquor selling, engaging in the prohibited

business avoided the certificate, though the prohibited act in no way contributed to his death.

Hexom v. Knights of Maccabees of the World, 117 N. W. 19, 140 Iowa, 41; *Pauley v. Modern Woodmen of America*, 87 S. W. 990, 113 Mo. App. 473.

In *Sovereign Camp of Woodmen of the World v. Hutchins*, 39 Okl. 267, 134 Pac. 1116, it was held that, under a beneficiary's certificate providing that it shall be void in case insured becomes "so intemperate from the use of intoxicating liquor as to produce delirium tremens," the right to the insurance is forfeited where insured gets delirium tremens from drinking intoxicating liquors, though he was not suffering from delirium tremens at the time of his death, and though his death did not result directly from drinking intoxicating liquors.

In *Robertson v. Fraternal Union of America*, 67 S. E. 247, 85 S. C. 221, it was held that, to invalidate a policy of life insurance under a provision that it should be void if insured shall become so far intemperate, or use drugs to such an extent as to impair his health," mere intemperance is not sufficient, but impairment of health therefrom must be shown.

In *Mathews v. Modern Woodmen of America*, 236 Mo. 326, 139 S. W. 151, Ann. Cas. 1912D, 483, insured, who was a jeweler when admitted to a local lodge of a mutual benefit order, afterwards became a bartender, continuing such for about six years until his death, paying dues, and dying while in good standing technically. By the application and answers forming a part of the contract, insured stated that he understood and agreed that the order did not indemnify against death from suicide or from death "resulting" from occupations prohibited to its members by its laws. One of the by-laws stated the qualifications of persons who might become members, excluding among others, persons engaged as bartenders, and the policy contained substantially the same provisions. It was held that, as both parties were bound by all the terms of the agreement and the policy was to be construed strictly against the insurer, it was bound by the first-mentioned statement in the application, which was to be construed as meaning that the policy was not forfeited by engaging in a prohibited occupation, unless death resulted therefrom, and the beneficiary was entitled to recover.

Where the laws of a beneficiary society provide that any member who shall use intoxicating liquors to such excess as to endanger his life, or materially to affect the risk on his life, shall forfeit all

benefits, in order that the use of such liquors by deceased shall be a defense, it must appear that his death was caused directly or indirectly by such use of intoxicating liquors as endangered his life, or materially affected the risk upon it (*Vail v. North American Union*, 191 Ill. App. 297).

2245-2246. (g) Breach of warranty or condition as forfeiting policy ipso facto

2245 (g). If the contract or by-laws so provide, a member of a fraternal order may be ipso facto suspended without any action of the order or any officer thereof.

Garrity v. Catholic Order of Foresters, 148 Ill. App. 189, judgment affirmed 90 N. E. 753, 243 Ill. 411; *Schwanekamp v. Modern Woodmen of America*, 120 Pac. 806, 44 Mont. 526; *Glaspy v. United Brotherhood*, 163 Ill. App. 78; *Galvin v. Knights of Father Mathew*, 155 S. W. 45, 169 Mo. App. 496; *Ostmann v. Supreme Lodge, Knights and Ladies of Honor*, 88 Atl. 949, 85 N. J. Law, 86; *Clair v. Supreme Council of the Royal Arcanum*, 155 S. W. 892, 172 Mo. App. 700; *Modern Woodmen of America v. Breckenridge*, 89 Pac. 661, 75 Kan. 373, 10 L. R. A. (N. S.) 136, 12 Ann. Cas. 636.

In *Washburn v. Union Cent. Life Ins. Co.*, 38 South. 1011, 143 Ala. 485, it was held that a forfeiture of an insurance contract for breach of condition by insured takes place upon the occurrence of the breach on which it is based.

The contrary view was taken in *Schwartz v. St. Elizabeth Roman & Greek Catholic Union*, 29 Ohio Cir. Ct. R. 471, holding that membership in a mutual benefit society cannot be forfeited against the will of the member by delinquency ipso facto; but he must first be given an opportunity to justify himself, and this must be followed by some action by the society looking to a severance of relations between the society and the member.

So in *Brown v. Great Camp of Knights of Modern Maccabees*, 132 N. W. 562, 167 Mich. 123, the sale of spirituous liquors by a member of a fraternal benefit association was prohibited when insured became a member, and the executive committee had power to suspend a member from all benefits who engaged in any occupation prohibited by the laws of the order, its decision after hearing being final, unless an appeal was taken; but it also had power to reinstate a member upon removal of the cause of suspension. It was held that merely engaging in a prohibited occupation, such as the sale of intoxicants, would not of itself forfeit

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the rights of a member under his certificate; the word "suspend" ordinarily implying a cessation which may not be permanent.

In *Supreme Tribe of Ben Hur v. Lennert*, 98 N. E. 115, 178 Ind. 122, overruling (*Ind. App.*) 94 N. E. 889, it was held that a benefit certificate providing for forfeiture should the insured engage in the sale of intoxicating liquor as a beverage is not rendered absolutely void upon breach of such provision, but is merely voidable by the insurer.

2247-2250. (h) Proceedings to give effect to forfeiture

2247 (h). In *Supreme Tribe of Ben Hur v. Miller*, 122 Ill. App. 489, it was held that, where the by-laws of a fraternal insurance society provide that a member who takes his own life becomes ipso facto suspended from membership, another by-law providing that no suspension shall be on mere rumor without investigation or trial has no application.

In *Modern Woodmen of America v. International Trust Co.*, 136 Pac. 806, 25 Colo. App. 26, it was held that a fraternal benefit company need not tender a return of the premiums in order to forfeit a certificate on the ground of willful misrepresentations by insured in his application as to his intemperate habits, though assessments must be returned on forfeiture in case of an unintentional breach of warranty.

In *American Cent. Life Ins. Co. v. Rosenstein*, 92 N. E. 380, 46 Ind. App. 537, affirming judgment 88 N. E. 97, on rehearing, it was held that where an insurance policy was payable to a third person as beneficiary, and after insured's death the beneficiary sued thereon, a tender of statu quo necessary to the enforcement of a forfeiture on facts alleged to have been first discovered by the insurer after insured's death should have been made to the beneficiary, and not to the widow or legal representative of insured.

2250-2251. (i) Persons affected by forfeiture

2250 (i). In *American Cent. Life Ins. Co. v. Rosenstein*, 92 N. E. 380, 46 Ind. App. 537, affirming 88 N. E. 97, it was held that where an insurance policy was payable to a third person as beneficiary, and after insured's death the beneficiary sued thereon, a tender of status quo necessary to the enforcement of a forfeiture on facts alleged to have been first discovered by the insurer after insured's death should have been made to the beneficiary, and not to the widow or legal representative of the insured.

2251-2252. (j) Rights after forfeiture

2251 (j). In *Wilcox v. Supreme Council of Royal Arcanum*, 136 N. Y. Supp. 377, 151 App. Div. 297, reversing order 123 N. Y. Supp. 83, 66 Misc. Rep. 253, it was held that where a member of a beneficial association was wrongfully expelled, and he carried his appeal within the order as far as possible and died before he could bring to trial mandamus proceedings to compel his reinstatement the judgment of expulsion was not conclusive in an action by the beneficiary on the certificate in which he attacked the tribunal which expelled him.

In *Graves v. Knights of the Maccabees of the World*, 92 N. E. 792, 199 N. Y. 397, 139 Am. St. Rep. 912, reversing judgment 112 N. Y. Supp. 948, 128 App. Div. 660, it was held that where a member of a fraternal order engaged in the saloon business, and thereby forfeited his certificate, and then retired from the business and obtained a new certificate solely to designate a new beneficiary, the rights acquired under the new certificate were not greater than those existing under the original certificate; there being nothing to show that the new certificate operated to waive a forfeiture of the original certificate.

7. PLEADING AND PRACTICE WITH REFERENCE TO PROMISSORY WARRANTIES OR CONDITIONS SUBSEQUENT**2252-2253. (a) Pleading**

2252 (a). In *Heffernan v. Prudential Ins. Co. of America*, 88 Misc. Rep. 93, 150 N. Y. Supp. 644, it was held that insurer may take advantage of a breach of a condition subsequent without pleading it, where the breach appeared from plaintiff's own evidence.

In *Kelly v. North American Union*, 146 Ill. App. 611, it was held that a defense that the insured became addicted to the excessive use of intoxicating liquors in violation of a condition subsequent contained in the contract of insurance is not available in the absence of a special plea, it being the object of a special plea to give plaintiff notice of special defenses relied upon by defendant which relieves it from the obligation to pay; and a plea alleging habitual use of intoxicating liquor by an applicant for accident insurance does not allege breach of a warranty of temperate habits (*Metropolitan Casualty Ins. Co. v. Cato*, 74 South. 118, 113 Miss. 303).

In *Schwanekamp v. Modern Woodmen of America*, 120 Pac. 806, 44 Mont. 526, it was held that an allegation of the answer in an ac-

tion on a benefit certificate that insured while a member engaged in the sale of malt, spirituous, and vinous liquors to be used as a beverage in the capacity of proprietor, agent, and servant—"that is to say, that on or about" a certain date, insured "engaged in the occupation of bartender in a saloon in the city of B."—sufficiently alleged a breach of the by-laws providing that a member who engages in the manufacture or sale of spirituous or malt liquors to be used as a beverage in the capacity of agent or servant shall forfeit all rights of membership; a "saloon" being a place where intoxicating liquors are sold as a beverage, and a "bartender" being one who works in a saloon serving the patrons with liquid refreshments.

In *Keatley v. Grand Fraternity* (D. C.) 198 Fed. 264, it was held that a fraternal order issuing a certificate subject to forfeiture for misstatements or concealments in the application may not take advantage of an irresponsive answer to a question in the application.

2254-2256. (b) Evidence

2254 (b). In *Wolfgang v. Modern Woodmen of America*, 167 Mo. App. 220, 149 S. W. 1167, a mutual benefit association seeking to defeat a recovery on a certificate on the ground that insured died by accident, directly traceable to employment in a prohibited occupation, has the burden of establishing the defense, where the facts making out a prima facie case for plaintiff are agreed on.

In *Marren v. North American Union*, 145 Ill. App. 375, it was held that, in an action upon a fraternal benefit certificate, the defense that a member was addicted to the excessive use of intoxicating liquor is not admissible under the general issue.

In *James v. Merchants' Life & Casualty Co.*, 136 N. W. 582, 118 Minn. 146, it was held that, in an action on an accident policy, evidence of the drinking habits of insured, standing alone, was irrelevant and immaterial.

In *Marren v. North American Union*, 145 Ill. App. 375, it was held that the sole fact of residence in the Washingtonian home is inadmissible in an action on a mutual benefit insurance policy as evidence to prove drunkenness of insured.

In *Evans v. Modern Woodmen of America*, 129 S. W. 485, 147 Mo. App. 155, it was held that where, in an action on a mutual benefit certificate, defendant claimed that insured was intoxicated at the time he was killed and that he was intemperate in the use of liquors in violation of the policy, evidence that at no time had in-

sured been tried by his local camp for intemperance or any other offense was incompetent.

In an action on an accident insurance policy, the burden was on the insurer to establish a forfeiture or exception relied on to rebut the liability *prima facie* made by the covenants of the policy.

Junior Order United American Mechanics v. Ringo, 143 S. W. 22, 146 Ky. 602; *Frazier v. Metropolitan Life Ins. Co.*, 141 S. W. 936, 161 Mo. App. 709; *Kelly v. North American Union*, 146 Ill. App. 611; *Denoyer v. First Nat. Accident Co.*, 130 N. W. 475, 145 Wis. 450; *Kidd v. National Council of Junior Order of United American Mechanics of United States*, 193 S. W. 130, 137 Tenn. 398.

In *Queatham v. Modern Woodmen of America*, 127 S. W. 651, 148 Mo. App. 33, it was held that a mutual benefit association, seeking to defeat recovery on a certificate of insurance on the ground that the member died while engaged in a prohibited occupation, has the burden of showing that the member came to his death as a direct result thereof.

The sufficiency of evidence was considered in the following cases:

Ury v. Modern Woodmen of America, 149 Iowa, 706, 127 N. W. 665; *Sovereign Camp of Woodmen of the World v. Salmon* (Ky.) 120 S. W. 358; *Conley v. Supreme Court I. O. F.*, 122 N. W. 567, 158 Mich. 190; *Rauber v. Mutual Life Ins. Co. of New York*, 141 N. Y. Supp. 997, 156 App. Div. 446; *Glenty v. Knights of Columbus*, 131 N. Y. Supp. 792, 146 App. Div. 497; *Modern Woodmen of America v. Lynch* (Tex. Civ. App.) 141 S. W. 1055; *Grand Lodge A. O. U. W. of Connecticut v. Burns*, 80 Atl. 157, 84 Conn. 356; *Queatham v. Modern Woodmen of America*, 127 S. W. 651, 148 Mo. App. 33; *McEvoy v. Court of Honor*, 184 Ill. App. 317.

Sufficiency of evidence to go to the jury was considered in the following cases: *O'Connor v. Modern Woodmen of America*, 124 N. W. 454, 110 Minn. 18; *Almond v. Modern Woodmen of America*, 113 S. W. 695, 133 Mo. App. 382; *Everson v. General Fire & Life Assur. Corp., Limited, of Perth, Scotland*, 88 N. E. 658, 202 Mass. 169; *Garrity v. Catholic Order of Foresters*, 90 N. E. 753, 243 Ill. 411; *Gardner v. Metropolitan Life Ins. Co.*, 114 N. E. 717, 225 Mass. 439; *Constantino v. Massachusetts Accident Co.*, 109 N. E. 447, 221 Mass. 464.

2256. (c) Trial and review

2256 (c). In *McClelland v. Mutual Life Ins. Co. of New York*, 135 N. Y. Supp. 735, 151 App. Div. 264, it was held that, in an action on a policy of life insurance, a direction of a nonsuit at the

close of the plaintiff's evidence held improper for a failure to have proof by the defendant on the tender of premiums paid.

In *Quick v. Modern Woodmen of America*, 91 Neb. 106, 135 N. W. 433, a suit on fraternal beneficiary certificate, the refusal of an instruction that, if the jury finds that assured changed his occupation from painter to locomotive fireman under conditions releasing defendant from liability under the terms of the contract, the plaintiff is not entitled to recover, was held error, where the evidence tended to establish the facts recited in the instruction.

In *Schon v. Modern Woodmen of America*, 99 Pac. 25, 51 Wash. 482, it was held that a charge that "the best definition I can give you of the word 'intemperate' so far as the intemperate use of intoxicating liquor is concerned is the immoderate use of intoxicating liquor. I don't know whether you know any more about it now than you did before; I don't"—simply indicated that the word "intemperate" did not admit of precise definition, though well understood, and was not erroneous.

In *Evans v. Modern Woodmen of America*, 129 S. W. 485, 147 Mo. App. 155, it was held that, in an action on a mutual benefit certificate, whether there was a breach of warranty consisting of a misstatement of insured's age, and whether deceased was intoxicated at the time of his death, and whether he was intemperate during the time he was insured, were questions for the jury. .

XIV. FORFEITURE OF LIFE OR ACCIDENT INSURANCE CONTRACTS FOR NONPAYMENT OF PREMIUMS OR ASSESSMENTS

1. DEFAULT IN PAYMENT OF PREMIUMS AS GROUND OF FORFEITURE

2259-2263. (a) Effect of nonpayment in general

2259 (a). The obligation of a life insurance contract, in the absence of contract or statute otherwise providing, is conditional upon the payment of premiums as they become due, and if the policy be allowed to lapse, no recovery can be had thereon.

Sewell v. Continental Casualty Co., 46 South. 714, 92 Miss. 857; *Turner v. Mutual Life Industrial Ass'n of Georgia*, 65 S. E. 255, 6 Ga. App. 478; *Pacific Mut. Life Ins. Co. v. Carter*, 123 S. W. 384, 92 Ark. 378, Id., 92 Ark. 378, 124 S. W. 764; *New York Life Ins. Co. v. Slocum*, 177 Fed. 842, 101 C. C. A. 56; *Weston v. State Mut. Life Assur. Co.*, 137 Ill. App. 319, affirmed 84 N. E. 1078, 234 Ill. 492; *Rose v. Mutual Life Ins. Co. of New York*, 88 N. E. 204, 240 Ill. 45; *Equitable Life Assur. Society of United States v. Ellis*, 147 S. W. 1152, 105 Tex. 526, affirming (Tex. Civ. App.) 137 S. W. 184; *Illinois Life Ins. Co. v. McKay*, 64 S. E. 1131, 6 Ga. App. 285; *Melvin v. Piedmont Mut. Life Ins. Co.*, 64 S. E. 180, 150 N. C. 398, 134 Am. St. Rep. 943; *Security Mut. Life Ins. Co. v. Riley*, 47 South. 735, 157 Ala. 553; *State Life Ins. Co. v. Murray*, 159 Fed. 408, 86 C. C. A. 344, affirming (C. C.) 151 Fed. 539; *Lesseps v. Fidelity Mut. Life Ins. Co. of Philadelphia*, 45 South. 522, 120 La. 610; *Arnold v. Empire Mut. Annuity & Life Ins. Co.*, 60 S. E. 470, 3 Ga. App. 685; *North-Western Nat. Life Ins. Co. v. Brooker*, 120 Ill. App. 301; *Wells v. Union Cent. Life Ins. Co.*, 98 S. W. 697, 81 Ark. 145; *Thompson v. Fidelity Mut. Life Ins. Co.*, 92 S. W. 1098, 116 Tenn. 557, 6 L. R. A. (N. S.) 1039, 115 Am. St. Rep. 823; *Plumer v. Continental Casualty Co.*, 77 S. E. 917, 12 Ga. App. 594; *Dibrell v. Citizens' Nat. Life Ins. Co.*, 153 S. W. 428, 152 Ky. 208; *Burton v. Columbian Nat. Life Ins. Co.*, 127 Pac. 1037, 20 Cal. App. 21; *Tigg v. Register Life & Annuity Ins. Co. of Iowa*, 133 N. W. 322, 152 Iowa, 720; *Equitable Life Assur. Society of United States v. Ellis* (Tex. Civ. App.) 137 S. W. 184; *MacArthur v. United States Health & Accident Ins. Co.*, 151 Ill. App. 507; *Smoot v. Bankers' Life Ass'n*, 120 S. W. 719, 138 Mo. App. 438; *Monast v. Manhattan Life Ins. Co.*, 79 Atl. 932, 32 R. I. 557, Ann. Cas. 1912D, 1007; *Burke v. Prudential Ins. Co. of America*, 108 N.

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E. 1069, 221 Mass. 253, Ann. Cas. 1917E, 641; *Rocci v. Massachusetts Accident Co.*, 110 N. E. 972, 222 Mass. 336; *Fidelity Mut. Ins. Co. v. Oliver*, 71 South. 302, 111 Miss. 133; *McDonald v. Columbian Nat. Life Ins. Co.*, 97 Atl. 1086, 253 Pa. 239, L. R. A. 1916F, 1244; *Edington v. Michigan Mut. Life Ins. Co.*, 183 S. W. 728, 134 Tenn. 188; *Norris v. New England Mut. Life Ins. Co. (Ala.)* 73 South. 377; *Underwood v. Security Life & Annuity Co. of America (Tex.)* 194 S. W. 585; *Moore v. General Accident, Fire & Life Assur. Corp.*, 92 S. E. 362, 173 N. C. 532.

In *Public Savings Ins. Co. of America v. Coombes*, 108 N. E. 244, 59 Ind. App. 523, it was held that a stipulation in a life policy for its forfeiture for nonpayment of premiums at maturity is enforceable, in the absence of contrary statutory provisions.

In *Titlow v. Reliance Life Ins. Co.*, 92 Atl. 747, 246 Pa. 503, it was held that the consequence of a default in payment of one annual payment under a continuous contract of insurance is determined by common-law principles, where the contract does not otherwise provide.

A condition in a life policy, providing for its forfeiture for nonpayment of premiums, is for the benefit of insurer, and will be strictly construed; and a forfeiture will be enforced only when such is the plain meaning of the contract.

Ætna Life Ins. Co. of Hartford, Conn., v. Wimberly, 112 S. W. 1038, 102 Tex. 46, 23 L. R. A. (N. S.) 759, 132 Am. St. Rep. 852, reversing (Tex. Civ. App.) 108 S. W. 778; *Equitable Life Assur. Society of United States v. Golson*, 48 South. 1034, 159 Ala. 508.

In *Union Cent. Life Ins. Co. v. Zihlman*, 69 S. E. 855, 68 W. Va. 272, it was held that the provision in a life insurance policy making it void without action of the insurer in case of failure of insured to pay any premiums due thereunder, or any note given for such premiums is intended for the benefit of the insurer, and it is optional with it to declare a forfeiture or not.

In *Jackson v. Mutual Life Ins. Co. of New York*, 186 Fed. 447, 108 C. C. A. 369, it was held that where by a life policy the insurer's obligation to pay was based on the condition that the annual premium should be paid in advance on the delivery of the policy, and thereafter to the insurer on specified dates in every year during the continuance of the contract, the fact that the policy did not contain an express provision for forfeiture did not preclude a defense of forfeiture for nonpayment of premiums within the time specified.

It has been held that failure to pay a premium subsequent to the first on a life policy will not forfeit the policy where it contains no

provision for forfeiture on that ground, and all that the company can demand is the right to set off an unpaid premium, with interest.

Equitable Life Assur. Society of United States v. Golson, 48 South. 1034, 159 Ala. 508; *Haas v. Mutual Life Ins. Co. of New York*, 121 N. W. 906, 84 Neb. 682, 26 L. R. A. (N. S.) 747, 19 Ann. Cas. 58; *Keeton v. National Union (Mo. App.)* 182 S. W. 798; *Friend v. Southern States Life Ins. Co. (Okl.)* 100 Pac. 457, L. R. A. 1917B, 208.

Though a policy stipulates that it is incontestable and does not expressly provide for forfeiture, yet where payment is conditioned on payment of premiums, such payments become conditions precedent, and the stipulation of incontestability does not apply to failure to pay premiums (*Pope v. New York Life Ins. Co.*, 181 S. W. 1047, 192 Mo. App. 383).

When a member of an insurance organization is suspended, he still possesses rights in the organization until a forfeiture has been declared (*Keeton v. National Union*, 178 Mo. App. 301, 165 S. W. 1107). And, if a certificate of insurance was not, in fact, forfeited by the failure on the part of the insured to pay an assessment, the fact that he applied for reinstatement does not operate to produce or establish such a forfeiture (*Sterling Life Ins. Co. v. Rapps*, 130 Ill. App. 121).

A covenant of an insurance company to pay a life policy, and that of insured to pay subsequent premiums after the first year, is not so independent that the agreement to pay without actual payment would be sufficient to keep the policy in force (*Noble v. Southern States Mut. Life Ins. Co.*, 162 S. W. 528, 157 Ky. 46). And where a life policy provides that, after payment of the first premium, 30 days' grace shall be allowed on subsequent premiums, and insured died after paying the first premium, without paying the second, and within 30 days after it became due, his failure to pay the second premium within the days of grace did not authorize a forfeiture of the policy (*Gottlieb v. Abraham Lincoln Mut. Life Ins. Co.*, 73 Atl. 1057, 225 Pa. 102, 133 Am. St. Rep. 856).

In *Ellis v. Anderson*, 49 Pa. Super. Ct. 245, a policy provided that: "All payment of premiums shall be payable in advance. * * * The failure to pay any of the first three premiums, or installments thereof shall avoid and annul this policy." The policy stated the amount to be paid thus: "Five thousand dollars less the unpaid balance of the current year's premium, if any, and any other indebtedness on the policy." It was held that the latter provision indi-

cated that it was in the contemplation of the parties that the policy might still be in full force even though the current year's premium had not been fully paid.

In *Thompson v. Fidelity Mut. Life Ins. Co.*, 92 S. W. 1098, 116 Tenn. 557, 6 L. R. A. (N. S.) 1039, 115 Am. St. Rep. 823, an insurance policy provided that if the premiums which were payable quarterly were paid when due, the insurer would pay to the insured's representative the face value of the policy "less the balance of the dues for the current year of the death of the insured," and any indebtedness of insured to the association, followed by a provision for forfeiture on failure of insured to pay when due any moneys required to be paid under the policy. It was held that such provisions gave the insurer the right to deduct from the face of the policy installments not due at the time of insured's death but which became due during the current year, in case insured regularly met his payments at maturity, and did not confer on insured a right to insurance for the whole current year on the payment of installments of the policy.

2263-2266. (b) Statutory provisions

2263 (b). The nonforfeiture provisions of Rev. St. Mo. 1899, §§ 5856-5859, 7897-7900, cannot without denying the right of freedom to contract, given by Const. U. S. Amend. 14, be applied to invalidate a loan agreement made in New York between a life insurance corporation of that state and the beneficiary, a resident of New Mexico, and the settlement effected in New York under such agreement in conformity to the New York laws, though the original contract was made in Missouri, though its laws provided that such company should be subject to the laws of Missouri as if it were a domestic corporation (*New York Life Ins. Co. v. Head*, 34 Sup. Ct. 879, 234 U. S. 149, 58 L. Ed. 1259, reversing *Head v. New York Life Ins. Co.*, 147 S. W. 827, 241 Mo. 403; *New York Life Ins. Co. v. Head*, 34 Sup. Ct. 883, 234 U. S. 166, 58 L. Ed. 1266).

In *Leeker v. Prudential Ins. Co. of America*, 134 S. W. 676, 154 Mo. App. 440, it was held that, where a life insurance policy contains no provision for an unconditional surrender value equal to the net single premium as provided in Rev. St. 1899, § 7900 (Ann. St. 1906, p. 3755), section 7897 (page 3752), providing that after payment of three annual premiums a policy is not forfeited by subsequent default regardless of its terms, applies.

Rev. St. Mo. 1899, § 7897, providing for the nonforfeiture of life insurance policies after the payment of three annual premiums, and

making the balance a premium for temporary insurance, is constitutional (*Mun v. New York Life Ins. Co.* [Mo. App.] 181 S. W. 606). In *Burridge v. New York Life Ins. Co.*, 109 S. W. 560, 211 Mo. 158, it was held that Laws 1903, p. 208, in amendment of Rev. St. 1899, § 7897 (Ann. St. 1906, p. 3752), striking therefrom the restriction that the notes or other evidence of indebtedness to the company that may be deducted from the net value of a life policy as to which there has been a default in payment of a premium, before applying it to the purchase of temporary insurance, shall be limited "to notes or other evidence of indebtedness to the company given on account of past premium payments," and enacting in lieu thereof a broader provision that there shall be deducted from the net value not only "notes given on account of past premium payments," but also "any other evidence of indebtedness to the company," is not retrospective so as to cover a policy then issued, the rule being that an act must be construed as prospective unless its language calls for retrospective operation, and Const. art. 2, § 15, prohibiting laws impairing the obligation of contracts, or retrospective in their operation.

A similar position was taken in *Hathaway v. Mutual Life Ins. Co. of New York* (C. C.) 99 Fed. 534, where it was held that the New York act of 1897 amending Laws 1892, c. 690, by enacting that the provision of such law which required a notice to be given before the forfeiture of a life insurance policy could be declared for nonpayment of premiums should protect such policy from forfeiture for one year only, and that it should become forfeited in accordance with its terms, and without notice, at the expiration of a year from the time of the default, is not retroactive.

Laws N. Y. 1897, p. 92, c. 218, § 2, declared that no life insurance corporation doing business within the state shall, within one year after default in the payment of premium, forfeit the policy, unless a written or printed notice, etc., shall have been duly addressed and mailed to the insured or the assignee of the policy. It was held, in *McDougald v. New York Life Ins. Co.*, 146 Fed. 674, 77 C. C. A. 100, that where an insurer subject to such act made no attempt to cancel a California policy until more than a year had elapsed after default in the payment of premium, such act was inapplicable.

The nonforfeiture law of Missouri (Rev. St. 1889, § 5856) does not apply to insurance on the assessment plan.

Moran v. Franklin Life Ins. Co., 140 S. W. 955, 160 Mo. App. 407;

Smoot v. Bankers' Life Ass'n, 120 S. W. 719, 138 Mo. App. 438;

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McCoy v. Bankers' Life Ass'n of Des Moines, Iowa, 114 S. W. 551, 134 Mo. App. 35.

In **Hayden v. Franklin Life Ins. Co.**, 136 Fed. 285, 69 C. C. A. 423, it was held that a policy of insurance on the assessment plan which had lapsed by failure to pay the quarterly stipulated premium and a call to meet the impairment of the reserve fund does not have such net value as to bring the policy within the nonforfeiture law, and where it expressly provides that, if any premium or assessment shall not be paid, the contract shall be void, the default prevents a recovery by the beneficiary under the policy. In the same case it was held that, although a policy under the head of "Insurance Plan" gives a table of quarterly payments varying with the age of the insured, it does not fix on it the character of an ordinary life policy so as to subject it after default by the insured to the provisions of the nonforfeiture law of Missouri, where the policy provides that, should the reserve fund, or any part thereof, be used, its impairment may be made good by an assessment in addition to the regular mortuary call, as such stipulation brings the policy within the designation of one under the assessment plan, as defined by Rev. St. Mo. 1899, § 7901.

In **New York Life Ins. Co. v. Hardison**, 85 N. E. 410, 199 Mass. 190, 127 Am. St. Rep. 478, it was held that a life insurance policy providing for grace of 30 days in the payment of premiums did not constitute a substantial compliance with St. 1907, p. 896, c. 576, § 75, subsec. 1, requiring Massachusetts policies to provide for grace of 1 month for the payment of every premium after the first. Under a similar Michigan statute (Pub. Acts 1907, No. 187, § 1, subdvs. 1, 2) it was held in **Franklin Life Ins. Co. v. Commissioner of Insurance**, 124 N. W. 522, 159 Mich. 636, that a form of policy providing that, if any premium or "any note or part thereof" is not paid when due, the policy shall be void and all premiums forfeited, is inconsistent with the statute, and unauthorized.

In **Wylie v. Jefferson Standard Life Ins. Co.**, 78 S. E. 745, 95 S. C. 163, it was held that the statute of North Carolina extending the time of forfeiture of life insurance policies in certain cases, by its express provisions, does not apply to a policy of term insurance for one year.

2266-2267. (c) Same—What law governs

2266 (c). In **Moore v. Northwestern Life Ins. Co.**, 87 S. W. 988, 112 Mo. App. 696, it was held that a life policy issued to in-

sured while in the state by a foreign insurance company doing a general insurance business in the state is a Missouri contract, and governed by Rev. St. 1899, § 7897, as to extended insurance, though containing provisions repugnant thereto.

2267-2269. (e) Nonpayment of note

2267 (e). Unless it affirmatively appear that insurance policies expressly stipulate that, if a note for a premium is not paid, the policies shall lapse, the mere nonpayment of such a note will not affect the validity of the policies, nor necessarily relieve the insurer from payment thereof.

McGehee v. Rinker, 70 S. E. 962, 9 Ga. App. 147; *Arnold v. Empire Mut. Annuity & Life Ins. Co.*, 60 S. E. 470, 3 Ga. App. 685; *Union Cent. Life Ins. Co. v. Zihlman*, 69 S. E. 855, 68 W. Va. 272.

Where note is taken for life insurance premium and policy provides that note is not payment, but only extension of time, and that failure to pay at maturity shall forfeit policy, default in payment of note relieves insurer.

Marshall v. Farmers' & Bankers' Life Ins. Co., 159 Pac. 17, 98 Kan. 502; *Farmers' & Merchants' Mutual Life Ass'n v. Mason* (Ind. App.) 116 N. E. 852; *Norris v. New England Mut. Life Ins. Co.* (Ala.) 73 South. 377; *Owens v. North State Life Ins. Co.*, 92 S. E. 168, 173 N. C. 373; *Underwood v. Security Life & Annuity Co. of America* (Tex.) 194 S. W. 585.

That insured executed and delivered to the insurer's agent a note for the first year's premium, and at his death was in default thereon, did not if the agent took the note under such circumstances as to constitute an absolute payment of the premium invalidate the insurance, under the provision of the policy that failure to pay any premium or note when due will forfeit the policy.

Devine v. Federal Life Ins. Co., 95 N. E. 174, 250 Ill. 203; *Williams v. Empire Mut. Annuity & Life Ins. Co.*, 8 Ga. App. 303, 68 S. E. 1082; *United States Annuity & Life Ins. Co. v. Peak*, 182 S. W. 565, 122 Ark. 58.

Where insured gave notes for premium providing that insurance should terminate if they were unpaid when due, though insurer retained notes unpaid after maturity, the insurance lapsed.

French v. Columbia Life & Trust Co., 156 Pac. 1042, 80 Or. 412; *Sims v. Jefferson Standard Life Ins. Co.*, 89 S. E. 445, 18 Ga. App. 347; *Dunn v. Columbian Nat. Life Ins. Co.*, 89 S. E. 432, 18 Ga. App. 383.

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In *Federal Life Ins. Co. v. Warren*, 181 S. W. 331, 167 Ky. 740, however, it was held that retention by a life insurance company of a note payable in five months, given in advance to cover the amount of a year's premium, worked a lapse of the policy at the expiration of the premium period.

Where insured refused to pay the note given for the first premium and agreed with the insurer that the insurance contract and note should stand discharged, held, that the beneficiary could not recover on the policy after insured's death (*Our Home Life Ins. Co. v. Peacock*, 70 South. 775, 71 Fla. 35).

In *Reed v. Bankers' Reserve Life Ins. Co.* (C. C.) 192 Fed. 408, a provision of a life insurance policy, giving the insured a grace of one month on payment of premiums, was held not to apply to a note given for a past-due premium.

In *Burnham v. Michigan Mut. Life Ins. Co.*, 112 N. W. 704, 149 Mich. 84, an application for insurance provided that, if the first or any subsequent premium should be settled by note, such settlement should not be deemed payment, but only an extension of time for payment, and that, if the note should not be fully paid when due, then for any loss incurred while it remained unpaid the company should not be liable. A note given for a premium bore on its face the words "Send to office for collection"; the word "office" being written in between the other words, which were printed. It was held that, the note being past due and unpaid when insured died, the company was not liable, though the note was not sent to the office where insured was employed; there being no evidence to support the inference that the office referred to was that where insured was employed.

2269-2271. (f) Same—Condition forfeiting policy on default

2269 (f). A life policy stipulating that failing to pay at maturity any renewal premium or any installment thereof, or any note, will render the contract void, is forfeited for nonpayment at maturity of a premium note.

Stephenson v. Empire Life Ins. Co., 76 S. E. 592, 139 Ga. 82; *Security Life & Annuity Co. of America v. Underwood* (Tex. Civ. App.) 150 S. W. 293; *National Life Ins. Co. v. Manning*, 86 S. W. 618, 38 Tex. Civ. App. 498; *Reppond v. National Life Ins. Co.*, 100 Tex. 519, 101 S. W. 786, 11 L. R. A. (N. S.) 961, 15 Ann. Cas. 618, reversing (Tex. Civ. App.) 96 S. W. 778; *Hlpp v. Fidelity Mut. Life Ins. Co.*, 57 S. E. 892, 128 Ga. 491, 12 L. R. A. (N. S.) 319; *Parry v. Southeastern Life Ins. Co.*, 78 S. E. 441, 95 S. C. 1.

Under the provisions of insurer's receipt and of a note given to extend a policy until default in payment of the note when all rights thereunder should cease and the policy be ipso facto null and void, failure to pay the note at maturity forfeited the policy.

Security Life & Annuity Co. of America v. Underwood (Tex. Civ. App.) 150 S. W. 293; *Fidelity Mut. Life Ins. Co. v. Bussell*, 86 S. W. 814, 75 Ark. 25; *Satterfield v. Fidelity Mut. Life Ins. Co.*, 55 South. 200, 171 Ala. 429.

In *North American Acc. Ins. Co. v. Bowen* (Tex. Civ. App.) 102 S. W. 163, an accident policy stipulated for the payment of premiums in four equal installments in one, two, three, and four months, and declared that the notes were for premiums for consecutive periods of time and each was to apply only to its corresponding period. The application recited that the insured agreed that the policy should embrace four separate contracts and should not be in force after maturity of the first note, except by actual payment of the first and succeeding premium notes at maturity in their consecutive order. The first note provided that, if it was not paid at maturity, the policy should terminate on that date, and each of the other notes provided that, if the same was not paid at maturity, the policy should terminate. It was held that a failure to pay any one of the premium notes at the maturity thereof put an end to the policy without notice to the insured or formal cancellation.

2271-2274. (g) Same—Condition in note alone.

2271 (g). Where a note for a part of an annual premium for a policy stipulated that, should the note not be paid at maturity, the policy should become void without notice, a failure to pay at maturity worked a forfeiture of the policy; the note being merely an extension of the time of payment.

Sexton v. Greensboro Life Ins. Co., 72 S. E. 863, 157 N. C. 142; *Reed v. Bankers' Reserve Life Ins. Co.* (C. C.) 192 Fed. 408; *Murphy v. Lafayette Mut. Life Ins. Co.*, 83 S. E. 461, 167 N. C. 334; *White v. New York Life Ins. Co.*, 86 N. E. 928, 200 Mass. 510.

In Georgia, however, failure to pay a note taken in payment of a premium will not forfeit the policy, though it is so stipulated in the note, where there is no condition in the policy itself providing for such a forfeiture.

Arnold v. Empire Mut. Annuity & Life Ins. Co., 60 S. E. 470, 3 Ga. App. 685; *Fidelity Mut. Life Ins. Co. v. Goza*, 78 S. E. 735, 13

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Ga. App. 20; *Columbian Nat. Life Ins. Co. v. Mulkey*, 79 S. E. 482, 13 Ga. App. 508.

In *Marshall v. Missouri State Life Ins. Co.*, 129 S. W. 40, 148 Mo. App. 669, a life policy apparently contemplated payment of the first premium in advance and in cash, and payment of all others in advance, and did not provide for forfeiture if first premium notes were not paid at maturity, as was stipulated in the notes, and provided that it should be incontestable after one year from its date provided premiums were duly paid; that, after it had been in force for one year, a grace of one month would be allowed in the payment of premiums; that after three annual premiums were paid with the policy in force the company would make a certain loan thereon; and that it would give insured a choice of options in a table of loan values. It was held that there was no essential repugnancy between the policy and the premium notes as to its forfeiture.

Code Iowa, § 1741, requires insurance companies on the issue or renewal of any policy to attach thereto or indorse thereon a copy of any representation of the insured made a part of the policy, or referred to therein, or which may affect its validity, and provides that a failure so to do shall preclude the insurer from relying on such representation or the falsity thereof in any action on the policy. In *Wilson v. Royal Union Mut. Life Ins. Co.*, 114 N. W. 1051, 137 Iowa, 184, a wife took out in defendant insurance company a policy on her life for the benefit of plaintiff, her husband, the policy containing no power clause to forfeit it for nonpayment of premiums. Subsequently the husband and wife obtained from defendant a loan on the policy on a note containing such a forfeiture clause. It was held, that the defendant was not precluded from relying on the forfeiture clause in the note in an action by the husband on the policy, though the note was not attached to or indorsed on the policy, the note being a subsequent contract modifying the policy and not within the statute.

2276-2277. (1) Nonpayment of loan or interest thereon

2276 (i). In *Dibrell v. Citizens' Nat. Life Ins. Co.*, 153 S. W. 428, 152 Ky. 208, it was held that where the insured died, while the loan for which he had pledged his policy to the insurer was past due and unpaid, and after his policy had ceased for nonpayment of a premium, there could be no recovery on the policy. It was stated in the same case that, where the insurer took a premium note under

the terms of which it was entitled to collect the earned premium after the policy had lapsed, the acceptance of a payment on the note, which payment was less than the earned premium, did not operate to revive the policy, or keep it alive. So, where a note to an insurer was for the full loan and surrender value of a life policy assigned as security, the insurer had the right on default on the note to cancel the policy (*Salig v. United States Life Ins. Co.*, 84 Atl. 826, 236 Pa. 460).

In *Frese v. Mutual Life Ins. Co. of New York*, 105 Pac. 265, 11 Cal. App. 387, it was held that the fact that insurer in a life policy loaning money to insured and the beneficiary under an agreement whereby the policy was pledged to secure it, and whereby insurer, in case of default, could cancel the policy and apply the cash surrender value to the payment of the loan, extended by agreement the time for the payment of the debt, did not thereby waive its right to cancel the policy for nonpayment at the maturity of the debt as fixed by the new agreement, as the new agreement operated for the benefit of insured and beneficiary.

Where a life insurance policy was pledged with insurer as security for a loan, and the insurer failed to foreclose the pledge prior to insured's death, it could not, by foreclosing the pledge, thereafter deprive the insured's legal representative of any valid accrued right of action on the policy (*McEachern v. New York Life Ins. Co.*, 82 S. E. 820, 15 Ga. App. 222).

Where a paid-up policy was pledged with the insurer for a loan under an agreement that it could be canceled for \$500 less than its true value, the amount exacted was a penalty, making the agreement void, and an attempted forfeiture of the policy by the insurer for nonpayment of the loan was ineffective (*Palmer v. Mutual Life Ins. Co. of New York*, 141 N. W. 518, 121 Minn. 395, Ann. Cas. 1914D, 160).

2277-2279. (k) Proceedings to give effect to forfeiture

2277 (k). In *Ingersoll v. Mutual Life Ins. Co. of New York*, 156 Ill. App. 568, it was held that, however essential promptness in the payment of premiums may be to a life insurance company's business, courts will not, in aid of mutual insurance companies, any more than in aid of others, sustain forfeitures, either with or without notice, unless the right thereto be perfectly clear. So in *Chicago City Ry. Employees' Mut. Aid Ass'n v. Hogan*, 124 Ill. App. 447, it was held that a forfeiture of the benefits arising from member-

ship in a fraternal organization will not be enforced, unless it appear that the provisions of the by-laws pursuant to which such forfeiture is sought to be declared had been complied with. And where an insurance company claims a forfeiture for nonpayment of a premium note, it must offer to surrender the note (*Arnold v. Empire Mut. Annuity & Life Ins. Co.*, 60 S. E. 470, 3 Ga. App. 685).

The general rule is that where no notice of when a premium will be due is required, and there is default in payment, the insurer is not required to declare a forfeiture, but may set it up by way of defense when sued on the policy.

Rose v. Mutual Life Ins. Co. of New York, 88 N. E. 204, 240 Ill. 45; *Monahan v. Fidelity Mut. Life Ins. Co.*, 148 Ill. App. 171, judgment affirmed 242 Ill. 488, 90 N. E. 213, 134 Am. St. Rep. 337; *Security Life & Annuity Co. of America v. Underwood* (Tex. Civ. App.) 150 S. W. 293; *Patterson v. Equitable Life Assur. Society*, 165 S. W. 454, 112 Ark. 171; *Rocci v. Massachusetts Accident Co.*, 110 N. E. 972, 222 Mass. 336; *Underwood v. Security Life & Annuity Co. of America* (Tex.) 194 S. W. 585; *Rhodes v. Royal Union Mut. Life Ins. Co.*, 56 Pa. Super. Ct. 233;

Contra: *McKune v. Continental Casualty Co.*, 154 Pac. 990, 28 Idaho, 22; *McEachern v. New York Life Ins. Co.*, 82 S. E. 820, 15 Ga. App. 222; *Schwartz v. Murphysboro Mutual County Fire Ins. Co.*, 161 Ill. App. 254.

Where a statute required a life insurance company to give notice of the nonpayment of a premium before it could forfeit the policy, it cannot claim a forfeiture without showing the giving of the required notice, though the insured was unable to pay the premium and the absence of notice did not cause him to make default (*Equitable Life Assur. Soc. of United States v. Perkins*, 41 Ind. App. 183, 80 N. E. 682). So, too, where insurer attempted to collect a monthly installment of a premium, notwithstanding failure of insured to pay on the 1st of the month, the refusal of insured to pay, accompanied by his statement that he intended to give up the insurance, as his wife, the beneficiary, wished him to do so, did not justify a forfeiture of the policy, in the absence of insurer taking formal steps to forfeit (*Markgraf v. Fellowship of Solidarity*, 119 N. Y. Supp. 665, 134 App. Div. 984; *Id.*, 65 Misc. Rep. 64, 119 N. Y. Supp. 665, judgment affirmed 95 N. E. 1133, 201 N. Y. 587).

2280-2281. (m) Persons affected by forfeiture

2280 (m). Where an insurance company, antedating a life policy to make it relate back and take effect as of a time before delivery (788)

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for the purpose of fixing maturity dates for premiums, did so without practicing fraud upon the insured, the beneficiary was bound by the contract (*New York Life Ins. Co. v. Franklin*, 87 S. E. 584, 118 Va. 418).

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2281-2286. (a) Right to and necessity of notice

2281 (a). Where the policy fixes definitely the amount of the premium and the time of payment, the insurer need not give insured notice of amount and maturity of premium, in the absence of statute or express or implied agreement to do so (*Mills v. National Life Ins. Co.*, 189 S. W. 691, 136 Tenn. 350). However, owing to the custom of the insurer to make demand for premiums, an insurance policy, cannot be forfeited for nonpayment of the premium, where a demand was not made by the insurer.

Ibs v. Hartford Life Ins. Co., 141 N. W. 289, 121 Minn. 310, Ann. Cas. 1914C, 798; *Mutual Life Ins. Co. of New York v. Davis* (Tex. Civ. App.) 154 S. W. 1184.

In *Cowen v. Equitable Life Assur. Soc.*, 84 S. W. 404, 37 Tex. Civ. App. 430, it was held that a provision of a life insurance policy contemplating the mailing of notices of accruing premiums to the insured, but not prescribing the consequences of a failure to give such notice, does not operate to continue the policy in force indefinitely or for another year, in case of such failure, but, at most, entitles the insured to a reasonable time after the day fixed by the policy in which to pay the premium; and the policy cannot be enforced for failure to give such notice where the premium was repeatedly demanded of the insured by a collecting agent, and insured died without paying or tendering it. Where a policy required plaintiff without notice to pay within 30 days from the first week day in December a mortuary premium and dues, the amount to be fixed by the notice if one was received, otherwise to be the same as the last preceding premium paid, absence of notice was no excuse for plaintiff's failure to pay any premium on the date specified (*Kray v. Mutual Reserve Life Ins. Co.*, 50 Tex. Civ. App. 555, 111 S. W. 421). And where premiums are payable at the home office, the company may, on notice, discontinue the custom of sending an agent to collect the premiums (*Wallace v. Metropolitan Life Ins. Co.*, 73 S. E. 698, 10 Ga. App. 517). An agreement by an insurance company to notify an assignee of a policy of the maturity of all

premiums upon said policy as they become due is not an agreement to notify the assignee of the maturity of a note given by the assignor for a past due premium, prior to the assignment of his policy (*Bank of Commerce v. New York Life Ins. Co.*, 54 S. E. 643, 125 Ga. 552).

In *Ingersoll v. Mutual Life Ins. Co. of New York*, 156 Ill. App. 568, it was held that a life insurance policy, which provides only that, "if this policy shall become void by nonpayment of a premium," payments made shall be forfeited, does not become void upon the nonpayment of a premium at its due date, but the insurance continues in force subject to a lien for the unpaid premium and to a right on the part of the company to terminate the contract if after due notice the insured shall fail to comply with the condition of the policy; that is, to pay the premium. So a clause making a policy incontestable except for failure to pay premiums, and providing that on payment of policy the company may deduct any sums due it, does not authorize forfeiture of the policy for failure to pay an annual premium when due, but the insurance continues subject to the right of the company to determine it after notice (*Friend v. Southern States Life Ins. Co.* [Okl.] 160 Pac. 457, L. R. A. 1917B, 208).

In *Hagins v. Aetna Life Ins. Co.*, 51 S. E. 683, 72 S. C. 216, it was held that where an accident policy provided for payments for separate consecutive periods of two, three, and five months, each payment to apply only to its corresponding insurance period and that no claim for injuries sustained during any period for which the respective premium had not been actually paid in full should be valid, the premiums to be paid by orders of insured on his employer from the earnings for the period, in case of failure of the insured to earn enough in one period to pay the premium due, the insured is not entitled to notice of nonpayment before the policy is avoided.

In *McGeehan v. Mutual Life Ins. Co.*, 111 S. W. 604, 131 Mo. App. 417, it was held that where, on a 20-year endowment policy subject to forfeiture on notice for nonpayment of premium, insured paid premiums for 12 years and then failed to pay further premiums for 8 years, he abandoned his contract, regardless of the non-action of the insurer; the statute covering only cases of casual neglect and preventing such instances from depriving insured of the benefit of his policy until after notice.

In *Mills v. National Life Ins. Co.*, 189 S. W. 691, 136 Tenn. 350, it was held that where premium notes given by insured were payable on demand, but further provided that lapse of contract would

be sufficient cause for cancellation without notice, the note was payable only on demand as long as the policy was kept alive, but on default it could be canceled without notice.

2286-2290. (b) Statutory provisions

2286 (b). In *Adam v. Manhattan Life Ins. Co. of New York*, 97 N. E. 740, 204 N. Y. 357, affirming judgment 125 N. Y. Supp. 1111, 140 App. Div. 922, a policy issued while Laws 1877, c. 321, was in force was held deemed issued subject to the statute which is a part thereof.

Under Insurance Law N. Y. § 92, forbidding forfeiture for non-payment of premium, within a year of default unless notice has been given of maturity of premium, etc., notice is not required prior to maturity of notes given for a premium, when the statutory notice has been given prior to the premium becoming due.

Bartholomew v. Security Mut. Life Ins. Co., 124 N. Y. Supp. 917, 140 App. Div. 88; *Conway v. Phoenix Mut. Life Ins. Co.*, 35 N. E. 420, 140 N. Y. 79; *O'Brien v. Union Cent. Life Ins. Co.*, 100 N. E. 702, 207 N. Y. 180, affirming 125 N. Y. Supp. 470, 140 App. Div. 362.

In *Liesney v. Metropolitan Life Ins. Co.*, 166 App. Div. 625, 151 N. Y. Supp. 1084, reversing 148 N. Y. Supp. 1057, 86 Misc. Rep. 650; it was held that under Insurance Law N. Y. § 92, there can be no recovery on a life insurance policy where the insured died more than one year after default in paying a premium of which no notice was given, though the action was begun less than two years after default.

The New York Statute (Laws 1892, p. 1972, c. 690, § 92, as amended by Laws 1897, p. 91, c. 218) forbidding forfeiture of policies within one year from default, unless notice has been mailed to the insured at his last known address in the state, is not applicable to persons not having a post office address in the state (*Napier v. Bankers' Life Ins. Co.*, 100 N. Y. Supp. 1072, 51 Misc. Rep. 283). It has also been held that this Insurance Law, providing for forfeiture of life policy if premium is not paid within one year from maturity, unless "insured or assignee" be notified of intended previous forfeiture within 45 days before premium is due, was not complied with by notifying insured, and not assignee, when insurer knew of assignment (*Davis v. Northwestern Mut. Life Ins. Co.*, 163 N. Y. Supp. 56, 98 Misc. Rep. 456).

In *Napier v. Bankers' Life Ins. Co.*, 100 N. Y. Supp. 1072, 51 Misc. Rep. 283, it was held that Insurance Law (Laws 1898, p. 160,

c. 85) § 312, requiring notice to insured irrespective of place of residence, relates only to what are known as "stipulated premium policies," and is not to be read in connection with Laws 1892, p. 1972, c. 690, § 92, forbidding forfeitures within one year from default, unless notice has been mailed to insured at his last address in the state.

The notice required by Laws Kan. 1913, c. 212, of cancellation or forfeiture of life policies, is of intention to forfeit under accrued right, and notice given before time for payment has expired is insufficient (*Priest v. Bankers' Life Ass'n of Des Moines*, Iowa, 161 Pac. 631, 99 Kan. 295). This statute, however, is not applicable to a life insurance policy issued in Nebraska in 1912 (*Lightner v. Prudential Ins. Co. of America*, 154 Pac. 227, 97 Kan. 97).

2290-2293. (c) Same—What law governs

2290 (c). Insurance business transacted in another state by a New York insurance company without any provision that the New York laws shall govern is not subject to the New York statute requiring a notice to be mailed to the policy holder in that state as a condition of forfeiture for nonpayment of premiums.

McElroy v. Metropolitan Life Ins. Co., 122 N. W. 27, 84 Neb. 866, 23 L. R. A. (N. S.) 968, 19 Ann. Cas. 28; *Rye v. New York Life Ins. Co.*, 130 N. W. 434, 88 Neb. 707; *Cilek v. New York Life Ins. Co.*, 145 N. W. 693, 95 Neb. 274; *Cowen v. Equitable Life Assur. Soc.*, 84 S. W. 404, 37 Tex. Civ. App. 430.

In *McElroy v. Metropolitan Life Ins. Co.*, 122 N. W. 27, 84 Neb. 866, 23 L. R. A. (N. S.) 968, 19 Ann. Cas. 28, it was held that, where the parties to an insurance contract are in different jurisdictions, the place where the last act is done necessary to the validity of the contract is the place of contract.

In *Jones v. New York Life Ins. Co.*, 122 Pac. 702, 32 Okl. 339, it was held that where an application for life insurance provides that the contract shall be construed according to the law of New York, provisions of the New York law, requiring notice as a condition to forfeiting or lapsing the policy, prevent forfeiture for nonpayment of premium without such notice. It was said in the same case that, where application for life insurance provides that a contract shall be construed according to New York law, provisions of New York law, requiring notice as a condition precedent to forfeiting or lapsing policy, prevent forfeiture for nonpayment of interest on loan or nonpayment of premium, or both, without notice, notwithstanding provisions in loan agreement.

A contrary position is taken in *Rose v. Mutual Life Ins. Co.* of New York, 88 N. E. 204, 240 Ill. 45, where it was held that a life policy issued on an application made in another state to a New York company is not subject, where insured has no post office address in New York, to the requirement of Laws N. Y. 1892, p. 1972, c. 690, § 92, as amended by Laws 1897, p. 92, c. 218, § 2, of notice to insured stating the amount of the premium, the place where it is to be paid, and to whom payable, as a condition of forfeiture for nonpayment of a premium, notwithstanding the application states that it is a part of the proposed contract, subject to the charter of the company and the laws of New York, for, since that section requires the notice to be given at the last known address of insured in New York, it can have no application.

In *McGeehan v. Mutual Life Ins. Co.*, 111 S. W. 604, 131 Mo. App. 417, a petition in an action on a life policy which alleges that the contract of insurance was made in New York, and that it was a part of the contract that the laws of New York were to become a part of the policy and to govern its terms, and which sets out the statute of New York which disallows a forfeiture for nonpayment of premium without first giving a written notice, and which avers that no such notice was given, alleges facts showing that the policy is a contract governed by the laws of New York.

2293-2294. (d) Same—Waiver

2293 (d). In *Allison's Ex'x v. Fidelity Mut. Life Ins. Co.* of Philadelphia, Pa., 107 S. W. 730, 32 Ky. Law Rep. 1025, it was held that the provision of a life policy that "notice of each and every premium due or to become due is given and accepted by the delivery and acceptance of this policy" is an express waiver of notice of the time when a premium is due and of forfeiture for nonpayment of premium.

In *Weston v. State Mut. Life Assur. Co.*, 84 N. E. 1073, 234 Ill. 492, affirming 137 Ill. App. 319, certain correspondence between an insured and a general agent of the insurer showed that the insured understood that he was giving up his insurance. He was told by the agent in a letter that the insurance could be kept in force in a certain way, but from the date of such letter until the policy was marked on the books of the company as lapsed, more than two months thereafter, he never communicated with the company or its agent, or did anything to indicate that he wanted to keep the policies in force or that they were in force. It was held that by

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his action he waived the right to have further notice from the company before forfeiting the policy, even though the law required notice to be given him as a prerequisite to forfeiture.

2294-2296. (e) Persons entitled to notice

2294 (e). In *Franklin Life Ins. Co. v. American Nat. Bank*, 84 S. W. 789, 74 Ark. 1, it was held that an assignee of a policy, who accepts the same as collateral security for a loan, takes it subject to the rules and by-laws of the company, and is not entitled to notice of the time of payment of premiums required by the by-laws to be given to the insured.

2296-2299. (f) Mode and sufficiency of notice

2296 (f). In *Flint v. Provident Life & Trust Co.*, 140 N. Y. Supp. 167, 78 Misc. Rep. 673, judgment affirmed 141 N. Y. Supp. 1119, 157 App. Div. 885, it was held that for an insurance company to avail itself of Insurance Law, § 92, permitting the forfeiture of a policy for nonpayment of premium, it must substantially comply with the terms of the statute as to notice, but the notice need not follow the statute literally. It was said in the same case that, in determining the sufficiency of a notice by insurer as a basis for forfeiture of the policy for nonpayment of premium, the whole paper must be considered, including printed matter above the date line and address of insured.

In the following cases under this statute the notice was held sufficient: *McCormack v. Security Mut. Life Ins. Co.*, 116 N. E. 74, 220 N. Y. 447; *Thompson v. Postal Life Ins. Co.*, 178 App. Div. 490, 165 N. Y. Supp. 500.

Nederland Life Ins. Co. v. Mehnert, 26 Sup. Ct. 15, 199 U. S. 171, 50 L. Ed. 139, 4 Ann. Cas. 480, reversing 127 Fed. 651, 62 C. C. A. 377 (prefixing the words "the conditions of your policy provide," although the policy in fact provides for a forfeiture only in case of nonpayment of the premium within thirty days after it is due); *Cowen v. Equitable Life Assur. Soc.*, 84 S. W. 404, 37 Tex. Civ. App. 430 (giving only the initial of the middle name instead of the full name).

In the following cases the notice was under this statute held insufficient: *McCormack v. Security Mutual Life Ins. Co.*, 146 N. Y. Supp. 613, 161 App. Div. 33 (notice incumbered with suggestions and surplus advice); *Flint v. Provident Life & Trust Co.*, 140 N. Y. Supp. 167, 78 Misc. Rep. 673, affirmed in 141 N. Y. Supp. 1119, 157 App. Div. 885 (failing to state that agent was duly appointed agent to collect the premium and that it should be paid by or before the day it falls due); *Flint v. Provident Life & Trust Co. of Phil-*

adelphia, 109 N. E. 248, 215 N. Y. 254, affirming judgment 141 N. Y. Supp. 1119, 157 App. Div. 885.

It is also stated in *Seely v. Manhattan Life Ins. Co.*, 61 Atl. 585, 73 N. H. 339, that a notice informing insured that his policy would expire the day the premium became due unless paid to a designated agent at a certain place failed to comply with Laws N. Y. 1892, p. 1972, c. 690, § 92, prohibiting a life insurance company to declare a policy forfeited for nonpayment of premium unless a written notice, stating among other things, that the policy will become forfeited and void unless the premium is paid on or before the day it falls due "to the corporation or to a duly appointed agent authorized to collect such premium," is duly addressed to the insured.

In *Ibs v. Hartford Life Ins. Co.*, 141 N. W. 289, 121 Minn. 310, Ann. Cas. 1914C, 798, a notice to insured, demanding payment of a single amount, which included an illegal assessment and the legal quarterly dues, and stating that unless such amount was paid by a day stated the policy would be forfeited, was held not a sufficient notice as to the dues.

In *Smith v. Mutual Reserve Life Ins. Co.*, 87 Pac. 347, 44 Wash. 315, the policy provided that notice of the time when premiums would be due should be sent to the insured at his last post office address appearing on the books of the company. The last notice before insured's death was mailed to his address appearing on the company's books, to which all prior notices had been sent, but the notice was not received by him on account of his absence. About five months before the mailing of the notice in question, insured wrote the company from another state than that of such address, remitting an assessment, and stating that he had forgotten the number of his policy, and that he had left home in such a hurry that he forgot to take a certain notice with him. It was held that the last notice was sufficient, as the letter did not authorize a change of his address on the company's books, and it was not incumbent on the company to send the beneficiary, the wife of insured, a notice though it knew that she was not residing at insured's address as it appeared on the company's books.

In *Nelson v. Modern Brotherhood of America*, 110 N. W. 1008, 78 Neb. 429, it was held that a by-law of a fraternal benefit society, providing for the suspension of a member for nonpayment of dues without other notice than that imparted by the by-law, is reasonable.

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In *Underwood v. Modern Woodmen of America*, 119 N. W. 610, 141 Iowa, 240, it was held that a by-law of a benefit society providing that the mailing of a copy of the society's official paper containing notice to members of assessments shall be sufficient service of such notice on each member is not void for unreasonableness.

In *Duffy v. Fidelity Mut. Life Ins. Co.*, 55 S. E. 79, 142 N. C. 103, 7 L. R. A. (N. S.) 238; *Id.* 59 S. E. 1131, 143 N. C. 697, it was held that a by-law of an assessment insurance company, providing that notice of an assessment may be given members by mail, is valid. In the last-mentioned case it was stated, however, that a by-law of an assessment insurance company, making a certificate by the treasurer or bookkeeper conclusive evidence of the mailing of a notice of an assessment, is unreasonable and invalid.

2299-2300. (g) Same—Notice by mail

2299 (g). In *Kavanaugh v. Security Trust & Life Ins. Co.*, 117 Tenn. 33, 96 S. W. 499, 7 L. R. A. (N. S.) 253, 10 Ann. Cas. 680, it was held that, in the absence of statute or the express terms of a policy making the mere mailing of a communication containing information of the approaching maturity of a premium sufficient, it must appear that such communication was received before it can operate as notice and thereby affect a forfeiture of the policy on failure to pay on the day.

2301. (h) Proof of sufficiency

2301 (h). In *Jones v. New York Life Ins. Co.*, 122 Pac. 702, 32 Okl. 339, it was held that the burden is on an insurer to show that it has given notice of forfeiture in accordance with New York law, which is made controlling by provisions of policy.

3. PAYMENT OR TENDER OF PREMIUM

2302-2304. (a) Time for payment

2302 (a). The day fixed for the payment of the annual premium is binding on both parties, in the absence of fraud or mistake (*Rose v. Mutual Life Ins. Co. of New York*, 88 N. E. 204, 240 Ill. 45).

In *Gilmore v. Continental Casualty Co.*, 58 Wash. 203, 108 Pac. 447, it was held that where an accident policy did not fix the time for the payment of the installments of the premium, but only provided that they should be paid promptly out of insured's wages for a particular month, the insured, through his employer as agent, had a reasonable time within which to make payment, and a delay of

three days after the end of the month was not so unreasonable as to forfeit the policy for nonpayment of the installments.

In *Ætna Life Ins. Co. v. Ricks*, 94 S. W. 923, 79 Ark. 38, a policy of accident insurance was issued in consideration of an order of assignment of moneys therein specified on insured's employer. The policy provided that the payments specified in the order were premiums for separate and consecutive periods of 2, 2, 3, and 5 months; that each should apply only to its corresponding insurance period; that no claim for injuries sustained during any period for which its respective premiums had not been actually paid in full should be valid; that no claim should be valid if the insured had left the employment of the employer named in the order without having earned in the week or month designated therein sufficient wages to pay the first premium, nor if he had collected or disposed of his wages earned in said week or month so that there should not remain sufficient for the payment of the premium. Insured left the employment of the employer named in the order without notice to the insurer after the first installment of premium had been deducted from his wages and paid to the insurer, leaving no funds in the hands of his employer out of which the succeeding installment of premium could be paid, and suffered an injury 26 days after the expiration of the time covered by the first installment without the second or any subsequent installment having been paid to the insurer. It was held that the policy had lapsed before the injury was received, and the insurer was not liable therefor.

In *Provident Sav. Life Assur. Soc. v. Taylor*, 142 Fed. 709, 74 C. C. A. 41, affirming (C. C.) 134 Fed. 932, it was held that where a policy provided that assured should be entitled to a grace of 30 days in the payment of premiums after the first, the policy was not forfeited on the death of assured within the period of grace by the nonpayment of a subsequent premium. It was also said in the same case that, where insurer died within the period of grace allowed by the policy for the payment of premiums, the rights of the parties on the policy became fixed, and no tender of the premium then due by insured's executors was necessary to enable them to recover on the policy; that where a policy sued on gave insured an absolute right to 30 days' grace in the payment of premiums, a notice of the maturity of the premium, reciting that unless the premium was paid by or before the due date the policy would be forfeited, and declaring that it was not to modify any terms of the contract, did not operate to deprive assured of the right to such period of grace;

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that such provision for grace was not a mere personal privilege exercisable only by assured during his lifetime, nor a mere continuing offer which assured could only accept during his lifetime, but was an integral part of the policy and a contractual right; and that a statement by assured, without consideration, that he did not intend to continue the policy, made while the same was in force, did not constitute a waiver of his right to grace in the payment of the succeeding premiums. In the same case it was further held that a term policy came within the settled rule that all life insurance contracts are intended to run for the life of the insured, subject to forfeiture for nonpayment of premiums, and not merely from year to year, the payment of each premium effecting a renewal, and that under the provision for grace the policy was continued in force during the 30 days, within which time the premium might be paid by the insured, or on his death by his representatives.

In *Rose v. Mutual Life Ins. Co.*, 144 Ill. App. 434, affirmed 88 N. E. 204, 240 Ill. 45, it was held that days of grace allowed for the payment of the second premium upon a policy are computed from the anniversary of the date upon which the policy became effective.

Under Laws S. D. 1909, c. 58, §§ 1, 2, 5, grace of one month in the payment of premiums on life insurance policies is provided although the premiums are payable semiannually (*Noem v. Equitable Life Ins. Co. of Iowa*, 153 N. W. 652, 35 S. D. 593).

In *Grattan v. Prudential Ins. Co.*, 108 N. W. 821, 98 Minn. 491, a life insurance policy provided that the premium should be paid annually on the 1st day of June, and that one month's grace should be allowed insured in which to make the same, and that the policy would be continued in force during that time, and notwithstanding the failure of insured to pay the premiums the insurance would be continued for 60 days from the due date of the premium as specified in the policy. It was held that the 60-day period commenced to run from June 1st, and not from the expiration of the 30 days of grace allowed on such payment.

In *Ætna Life Ins. Co. of Hartford, Conn., v. Wimberly*, 112 S. W. 1038, 102 Tex. 46, 23 L. R. A. (N. S.) 759, 132 Am. St. Rep. 852, reversing (Tex Civ. App.) 108 S. W. 778, it was held that where an insurance policy provided for an annual premium to be paid at or before 5 o'clock p. m. on the 1st day of October, but did not expressly provide that a failure to so pay would work a forfeiture, and where both in the policy and in the notice indorsed on the pre-

mium receipt there were clauses to the effect that, should any subsequent premium be not paid when due, the policy would determine, except that 30 days' grace during which the policy would be in force would be allowed for the payment of any premium after the first, the policy remained in force until midnight of the last day of grace, and payment of the premium could be made at any time in the period embraced within the 30 days of grace, there being no limitation in the clauses allowing grace requiring the assured to pay the premium at or before 5 o'clock of any particular day. However, under accident policy providing for renewal, where renewal premium was not paid on 1st day of month when due but was tendered 7th day of month, policy was not in force on 4th, the day of accident (*National Life & Accident Ins. Co. v. Reams* [Tex. Civ. App.] 197 S. W. 332).

Under accident policy taken out June 4th, providing for monthly payments on the 1st day of each month in advance, the premium paid August 1st covered insured's accidental death September 4th, though no payment was made September 1st (*Stout v. Missouri Fidelity & Casualty Co.* [Mo. App.] 179 S. W. 993).

2304-2307. (b) Same—Doctrine of the McMaster Case

2304 (b). In *Jewett v. Northwestern Nat. Life Ins. Co.*, 112 N. W. 734, 149 Mich. 79, it was held that the fact that a life policy insuring insured for a specified period of years commencing August 1st, and requiring the payment of premiums in four equal installments on or before the 1st day of August, November, February, and May in every year, was issued August 18th, did not postpone the payment of the quarterly premiums for 18 days from the specified days.

In *Forch v. Western Life Indemnity Co.*, 157 Ill. App. 244, the policy, dated June 3, 1907, contained the following provisions, among others: That the contract is made in consideration of the payment of premiums therein provided for "being the premium for term insurance for the period terminating on the 3d day of June, 1908, and in further consideration of the payment on said last-named date to this company at its home office in the city of Chicago as the premium for whole life insurance, of the sum of \$122.56 and a like sum annually thereafter on or before the third day of June in every year during the continuance of this contract." Said policy contained the additional provision: "This policy shall not take effect until the first payment shall have been actually paid dur-

ing the lifetime and sound health of the insured." It appeared that the policy was not delivered until the 6th day of June, 1907. It was held that failure to pay the second annual premium on the 3d day of June, 1908, caused the lapse of said policy.

In *McDougald v. New York Life Ins. Co.*, 146 Fed. 674, 77 C. C. A. 100, a policy was signed and delivered October 4, 1895, to take effect as of the 30th day of June of that year. It provided for grace of one month in the payment of premiums, and authorized reinstatement within six months after nonpayment of any premium, subject to evidence of good health satisfactory to the company, and declared that it could not be forfeited after it had been in force three full years as thereafter provided. At the time the policy was issued, the insured gave his note for two years' premiums. It was held that, treating the note as payment, the policy became subject to forfeiture at the expiration of the month of grace after June 30, 1897.

In *Tigg v. Register Life & Annuity Ins. Co. of Iowa*, 152 Iowa, 720, 133 N. W. 322, a policy providing for annual premium payments was issued September 23, 1907. It provided that the premium should be paid at or before 12 o'clock noon on the 7th day of August in each and every year during the life of the insured and the continuance of the policy. It also declared that a grace of 30 days should be granted in the payment of all premiums. It was held that the provision for grace at most did not extend the time for the payment of the second premium beyond September 7, 1908, and the second premium, not having been paid on that day, nor before insured's death on October 22d following, the policy lapsed. In this case, however, the policy also contained a clause that during the first year from its date it should be a policy of term insurance, and that, if the second year's premium be then paid, the policy should become a limited payment life policy. It was held that the insured was authorized to convert the term policy into a life policy by paying the second annual premium at any time before the expiration of a year from September 23, 1907, notwithstanding the 30 days of grace, allowed in the payment of premiums, expired prior to that time.

In *Mutual Life Ins. Co. v. Stegall*, 58 S. E. 79, 1 Ga. App. 611, an application for a policy of life insurance declared that the contract to be issued thereunder should not take effect until the first premium was paid. The policy issued thereon, August 30, 1904, provided that the condition of liability to pay the amount named

in the policy was that the annual premiums should be paid in advance on August 30th of each year thereafter. Insured did not accept the policy nor pay the first premium until November 19, 1904, and no premium was thereafter paid. Insured died October 29, 1905. It was held that the requirement of the application that the first premium be paid before the contract should take effect was for the benefit of the insurer, and that payment of the first premium and acceptance of the policy November 19th did not have the effect of continuing the policy for one year from that date, hence the beneficiary was not entitled to recover.

On the other hand, in *Stramback v. Fidelity Mut. Life Ins. Co.*, 102 N. W. 731, 94 Minn. 281, a life insurance policy provided for payment in advance on delivery, and thereafter on the 8th day of September and March of each year until the premium for 15 full years should be paid, but that the policy should continue in force only for the period actually paid, and should not be in operation until payment of the first premium and delivery of the policy, and that, if any premium was not paid when due, the policy should be void until duly reinstated. An application was dated August 25, 1902, and the policy was issued September 8th, and the first premium was paid and the policy delivered September 24, 1902. The second semiannual premium was paid, but the payment due September 8, 1903, was not paid, and insured died September 11th. It was held that the policy took effect and the insurance term began at the date of the payment and delivery September 24, 1902, and on payment of the second semiannual premium the period of insurance paid for expired September 24, 1903, and the forfeiture for nonpayment of the third semiannual premium did not cover the period of insurance then paid for.

So in *Supreme Lodge K. P. v. Few*, 76 S. E. 91, 138 Ga. 778, it was held, where a condition in a life policy provided that the contract should not begin until 12 o'clock noon of the day of the date thereof, and the insurer would not be liable unless the member had actually paid the membership fee and the first monthly payment while in good health, and the policy was dated November 1st, and delivered November 2d, and the first monthly payment was due and paid November 20th, the policy became binding November 20th, and not before.

In *Cilek v. New York Life Ins. Co.*, 97 Neb. 56, 149 N. W. 49, reversing judgment on rehearing 145 N. W. 693, 95 Neb. 274, where the application was dated June 13th, and a policy issued June 23d,

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which gave a grace of one month in payment of annual premiums, except the first, and insured died several years later on July 23d without having paid the premium for that year it was held that his policy had not lapsed.

In *Pfiester v. Missouri State Life Ins. Co.*, 116 Pac. 245, 85 Kan. 97, the agreements made between the agent of an insurance company, authorized to solicit and transmit applications for insurance, and a person whom he solicits to take insurance, as to what the application shall contain, and as to when premium is to be paid and the policy take effect, are in legal effect made with the company and binding upon it as to the conditions of the application. It was said in the same case that it is the duty of an agent authorized by an insurance company to solicit and transmit applications for insurance to prepare such applications so as to accurately state the result of the negotiations, and his failure so to do is in legal effect the fault of the company.

2307-2308. (c) Payment during insured's lifetime

2307 (c). In *National Life Ins. Co. v. Manning*, 86 S. W. 618, 38 Tex. Civ. App. 498, it was held that where a policy provided that insured should have the right to restore the same after forfeiture at any time within a month without furnishing evidence of good health, on payment of the premium in default, with 6 per cent. interest, such provision contemplated payment by "insured" during his lifetime, so that a payment of interest, after insured's death, though within the time specified, was insufficient to restore the insurance.

A policy of life insurance, issued September 22, 1905, on which the insured paid premiums for nine full years, in advance, including the year 1913, the policy thus being carried to noon of September 22, 1914, had not lapsed when insured died in the early morning of September 22, 1914 (*Edington v. Michigan Mut. Life Ins. Co.*, 183 S. W. 728, 134 Tenn. 188).

2308-2310. (d) Extension of time

2308 (d). An extension of the time of payment of the premium waives forfeiture for nonpayment, in the absence of an express contract to the contrary.

Cornell v. Travelers' Ins. Co. of Hartford, Conn., 85 N. E. 1107, 192 N. Y. 587, affirming 104 N. Y. Supp. 999, 120 App. Div. 459; *Wyllie v. Jefferson Standard Life Ins. Co.*, 78 S. E. 745, 95 S. C. 103; *Mutual Reserve Life Ins. Co. v. Heidel*, 161 Fed. 535, 88 C. C. A. 477.

Where insured has been given an extension of time in which to pay renewal premiums, his right is not destroyed by his injury before payment.

West v. National Casualty Co., 61 Ind. App. 479, 112 N. E. 115; *Rogers v. American Nat. Ins. Co.*, 89 S. E. 700, 145 Ga. 570.

In *Murphy v. Lafayette Mut. Life Ins. Co.*, 167 N. C. 334, 83 S. E. 461, it was held that a provision in a premium note that an insurance policy shall be void unless the note is paid at maturity is waived by a valid agreement to postpone payment, or by acts of the company inducing the policy holder to believe that such provision will not be enforced.

In *Citizens' Nat. Life Ins. Co. v. Morris*, 104 Ark. 288, 148 S. W. 1019, it was held that the extension of the time for payment of a premium note does not do away with the provision terminating the policy if the premium is not paid according to contract.

In *Weston v. State Mut. Life Assur. Soc. of Worcester*, 84 N. E. 1073, 234 Ill. 492, affirming judgment 137 Ill. App. 319, it was held that the waiver by an insurance company of the payment of premiums for a specified time is only available to the insured where insured made payment or sustained a loss insured against within that time.

In *Majestic Life Assur. Co. v. Tuttle*, 58 Ind. App. 98; 107 N. E. 22, it was held that extension of time of payment of premium notes to "corn gathering time" was not objectionable for indefiniteness.

In *Rouleau v. Continental Life Ins. & Inv. Co.*, 45 Utah, 234, 144 Pac. 1096, it was held, where the assignee of the insured requests an extension of time to pay a premium upon a life insurance policy, and the company grants the request, upon certain conditions which are complied with, the company cannot afterwards impose additional conditions.

In *Carr v. Prudential Ins. Co.*, 101 N. Y. Supp. 158, 115 App. Div. 755, by the express terms of the policy, it remained in force for a month of grace after the due date of a premium. During such month of grace, a partial payment of the premium was made, and an oral indefinite extension of time of payment made. The receipt given, however, was a revival receipt reciting that it was for the "amount of arrears," and providing that the receipt should not be construed as "renewing or creating any liability." It was held that the extension did not violate the terms of the receipt, since the liability already existed.

In *Lesseps v. Fidelity Mut. Life Ins. Co. of Philadelphia*, 120 La. 610, 45 South. 522, it was held that, where payment of a premium note after default and after forfeiture of the policy was demanded and made for the protection which the assured had received prior to the time the note matured, it was insufficient to continue the policy in force.

In *Lefler v. New York Life Ins. Co.*, 143 Fed. 814, 74 C. C. A. 488, it was held that where a life policy, after providing for payment of premiums on designated days in each year, declared that a grace of one month during which the policy remains in full force will be allowed in payment of all premiums except the first, and that, if any premium is not paid within the month of grace, the liability of the company shall be only that under the nonforfeiture provision of the policy, where a portion of the second premium was paid in cash and a note given for the balance, to be paid without grace in six months, and if it was not paid all benefits which full payment would have secured should become immediately void, it was the intent of the parties that the provision for grace of one month should be applicable to payment of all premiums in regular course, which should not apply to that portion of the second premium taken out of the regular course and made the subject of a special agreement.

In *Cowen v. Equitable Life Assur. Soc.*, 84 S. W. 404, 37 Tex. Civ. App. 430, it was held that evidence that premium receipts were sent to the collecting agents of an insurance company, with instructions to present the same for payment, and, if not paid, to hold them and present them from time to time, until recalled by the company, and that they were so presented, and not paid, and were returned in response to a direction of the company the day before insured's death, did not tend to show that an extension of the time of payment had been applied for by insured, or given, under a rule of the company providing for a 30-day extension on application, nor that the agents had power to grant an extension.

In *Stewart v. Home Life Ins. Co.*, 131 N. Y. Supp. 504, 146 App. Div. 709, a policy provided that grace of one month would be allowed in the payment of premiums, and that if any premium due was not paid within the month of grace the policy should be void. Insurance Law (Consol. Laws 1909, c. 28) § 92, provides that forfeiture of a policy for nonpayment of premium shall not be declared within one year after the default in payment of any premium, unless a written or printed notice shall have been mailed

to the insured at least 15 days before it was payable, nor until 30 days after the mailing of such notice. An insurer mailed due notice of a semiannual premium falling due February 27th, and on the last day of grace, March 27th, accepted one-fifth of the premium, and on April 27th the same amount, and extended payment of the balance until May 27th, at which time, it being still unpaid, the insurer treated the policy as lapsed. It was held that the extensions, which were upon condition that the balance should be paid, did not relieve the insured from the forfeiture or entitle him to any further grace.

2310-2312. (e) Same—By agent or broker

2310 (e). An agent of an insurer, with authority to collect premiums, has no authority to extend the time for the payment of premiums.

Cayford v. Metropolitan Life Ins. Co., 5 Cal. App. 715, 91 Pac. 206;
Murphy v. Prudential Ins. Co., 80 Pa. Super. Ct. 560.

The terms of a life policy, authorized by the application, are a limitation on the authority of the local agent, to the knowledge of insured, as to accepting or extending time of payment of the premium.

Metropolitan Life Ins. Co. v. Hall, 52 S. E. 345, 104 Va. 572; *Cook v. Metropolitan Life Ins. Co.*, 134 S. W. 13, 150 Mo. App. 299; *New York Life Ins. Co. v. O'Dom*, 100 Miss. 219, 56 South. 379, Ann. Cas. 1914A, 583; *Cranston v. West Coast Life Ins. Co.*, 63 Or. 427, 128 Pac. 427.

In *Carr v. Prudential Ins. Co.*, 101 N. Y. Supp. 158, 115 App. Div. 755, it was held that a general agent and superintendent of a life insurance company, on whose authority no limitation is shown, can, on receiving partial payment on a premium during the life of the policy, assent to the continuance of the policy until the balance is paid, and afterwards receive such balance. So in *North American Acc. Ins. Co. v. Bowen* (Tex. Civ. App.) 102 S. W. 163, an agent of an insurer was its managing agent within designated territory, and was empowered to take applications for insurance, countersign, issue, and deliver policies on the credit of the insured's notes, collect premiums, and appoint subagents within the territory. He took an insured's application and notes for the premium, and countersigned and delivered to the insured on the same day the policy. He retained, as he was authorized to do, the notes for collection and collected the amount of the first

note some 30 days after it became due, which was received and retained by the insurer. It was held that the agent had authority to extend the time of the payment of the premium notes in the absence of a limitation by the insurer of his authority and actual knowledge thereof by the insured. So in *Equitable Life Assur. Society of United States v. Ellis* (Tex. Civ. App.) 137 S. W. 184, it was held that a cashier of an insurance company officing with general agents having as their territory some 40 counties in the state, or with the general manager for the larger part of the state, empowered to collect premiums and order the return of policies for nonpayment of the first premium, and with whom policy holders can only deal with respect to the payment of premiums, may be deemed to have authority to extend the time of the payment of an annual premium due on a policy, stipulating that it shall lapse on the nonpayment of any premium when due, especially where the general agents referred insured to the cashier in response to a request for an extension of the time of payment in the absence of any limitation on his powers.

An extension of time by the company's agent has been made out in several cases. Thus in *Hagins v. Aetna Life Ins. Co.*, 55 S. E. 323, 75 S. C. 225, it was held that, where an insurance agent has authority to issue policies, his act, in changing the date of payment of premiums by indorsing on an envelope in which the policy is delivered a date different from that in the policy and in the order given by insured on his employer to pay the premium out of his wages, is binding on the insurance company. So in *North American Acc. Ins. Co. v. Whitesides*, 134 Ill. App. 290, 294, it was held that a waiver of the requirement of a policy as to payment upon a day named in the policy is established where it appears that the general agent of the insurer had expressly notified the insured that the provision of the policy requiring the payment of premium on the first day of each month would not be insisted upon, and where it further appeared that such agent had uniformly accepted payment of such premiums at any time before the 10th day of the month as a compliance with the terms of the policy. So in *Penn Mut. Life Ins. Co. v. Senhenn*, 40 Ind. App. 85, 81 N. E. 87, it was held that where defendant's general agent, who had power to bind it relative to the business with which he was intrusted, including the times of remittance of premiums collected, wrote insured, whose premium, due October 26, 1903, was in arrears, that, if the same was not paid by the last of March,

the agent would be compelled to return insured's receipt to the company, such letter operated as an extension of time for the payment of such premium until April 1st, and insured, having died in the meantime, was not in default. So, where an insurance company authorizes an agent to take note for premium in his own name, the company looking to him for the cash, the company is bound by his extension of the note (*Hutchins v. Globe Life Ins. Co.*, 126 Ark. 360, 190 S. W. 446).

In many cases, however, the courts have held that no extension was made binding on the insurer thus in *Matthews v. Travelers' Ins. Co.*, 73 Or. 278, 144 Pac. 85, it was held that the fact that an agent said of a policy, "We will carry it for you for awhile," without surrendering the renewal receipt, does not constitute a renewal. So in *Cowen v. Equitable Life Assur. Soc.*, 84 S. W. 404, 37 Tex. Civ. App. 430, it was held the fact that the collector of a life insurance company called on insured for the premium after it was due, and, on being told that insured was out, but had the money to pay the premium, refused to wait, and said he would call again, did not tend to show an extension of time of payment. So in *Kennedy v. Metropolitan Life Ins. Co.*, 40 South. 533, 116 La. 66, it was held that the fact that the agent of a life insurance company is authorized in his discretion to receive payment of premiums within 30 days after they fall due, provided the insured is alive and in good health, that he receives payment of past-due premiums, giving a receipt with the stipulation that its acceptance is to be taken as an act of grace and not a waiver of the conditions of the policy, does not authorize the assumption that the company will accept a future premium when overdue and when the insured is in bad health or dead. So in *Slocum v. New York Life Ins. Co.*, 33 Sup. Ct. 523, 228 U. S. 364, 57 L. Ed. 879, Ann. Cas. 1914D, 1029, modifying judgment *New York Life Ins. Co. v. Slocum*, 177 Fed. 842, 101 C. C. A. 56, it was held that acceptance by local agent from wife of insured of a check for a partial payment of the premium then due, with delivery of a "blue note" for insured to sign, did not continue insurance in force where insured died without signing the note and to the knowledge of insured and his wife the agent was without authority to waive full payment, save conformably to "blue note plan," and the company did not ratify the agent's acts.

In *Slocum v. New York Life Ins. Co.*, 33 Sup. Ct. 523, 228 U. S. 364, 57 L. Ed. 879, Ann. Cas. 1914D, 1029, modifying 177 Fed. 842, 101 C. C. A. 56, it was held that partial payment of a life insurance

premium is not effective to keep the policy in force, unless the agent does something operating as a waiver of a full payment.

2313. (f) Same—Custom and usage

2313 (f). In *Wallace v. Metropolitan Life Ins. Co.*, 73 S. E. 698, 10 Ga. App. 517, it was held that custom of life insurance company to receive premiums within 30 days after maturity does not require acceptance after such period.

In *Turner v. New York Safety Reserve Fund*, 144 N. Y. Supp. 261, 158 App. Div. 835, under a life and accident policy, it was held that, in view of the company's custom and its instructions to its general agent, premiums payable on the 1st of each month could be paid at any time within the month without the policy lapsing.

In *Thompson v. Fidelity Mut. Life Ins. Co.*, 92 S. W. 1098, 116 Tenn. 557, 6 L. R. A. (N. S.) 1039, 115 Am. St. Rep. 823, it was held that a course of dealing between insurer and insured, whereby the former has accepted payment of premiums after maturity, does not bind it to accept premiums for the purpose of avoiding forfeiture, where they are not tendered until after insured's death.

2314. (g) Mode and sufficiency of payment in general

2314 (g). In *Pride v. Continental Casualty Co.*, 125 Pac. 787, 69 Wash. 428, it was held that where one insured under an industrial or accident policy, after giving the insurer an order upon his master to deduct the amount of the premium from his wages, drew the full amount of his wages before any deduction had been made, and then left the service of his master, the default bars any recovery.

In *Patton v. Continental Casualty Co.*, 119 Tenn. 364, 104 S. W. 305, according to an agreement between an insured and the insurance company, the premiums were to be placed in the hands of the railway company for which the insured worked, to which the insurance company was to resort for payment. The money was so placed, and was so there at the time of insured's death, which occurred November 10th, but under the course pursued a demand was to be made and the railway company had till November 24th to pay. On that date the railway company refused payment on the ground that the deceased was no longer in its service, though it had the money in its hands. In an action on the policy it was held that the policy had not lapsed and the insurance company could claim only a deduction of the amount of the current premium.

In *Dominco v. Prudential Ins. Co. of America*, 49 Pa. Super. Ct.

156, it was held that a provision that "payments to be recognized by the company must be entered at the time of payment in the premium receipt book belonging with this policy" cannot defeat the policy, where the company, through its agent, actually received the premiums and by fraud, accident, or mistake they were not entered in the book.

In *Redman v. Fidelity Accident Ins. Co.*, 91 Neb. 89, 135 N. W. 373, it was held that where a collector for an accident insurance company furnished the money for the premium of a member on the pay day, placing it in a separate fund which he forwarded to the company, the insurance continued in force.

In *Mutual Benefit Life Ins. Co. v. O'Brien*, 149 S. W. 870, 149 Ky. 514, however, it was held that, where insured in a life policy borrowed money of insurer to pay a premium, and executed a certificate reciting the amount of the loan and stipulating that it should be a lien on the policy, he did not make a cash payment of the premium within the statute providing that no policy shall become void for nonpayment of premium after two full annual premiums in cash have been paid.

In *Murray v. State Life Ins. Co. (C. C.)* 151 Fed. 539, a soliciting agent for a life insurance company sold his mother a policy on the life of her husband and collected the first premium, which he remitted to the company. Although having no authority from the company to do so, he also collected and remitted the second premium. When the third premium became due he again requested and received payment of the same, but did not remit the money to the company. It was held that in an action on the policy, as the company's prior conduct was such as to induce her to believe that he was an agent to collect premiums, it was estopped from claiming a forfeiture of the policy because of the nonreceipt of such premium.

2314-2315. (h) Sufficiency of tender

2314 (h). In *People v. Western Life Indemnity Co.*, 181 Ill. App. 116, it was held that under a provision in a policy giving insured 30 days' grace in which to pay premiums with interest thereon, the company has no immediate ground to expel a member, where he tenders the premiums within the time specified, though he does not tender the interest.

In *Knott v. Security Mut. Life Ins. Co.*, 144 S. W. 178, 161 Mo. App. 579, and *Buchanan v. Same* (Mo. App.) 144 S. W. 185, a ten-

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der of premiums stipulated in a policy of life insurance was held sufficient to prevent a forfeiture after a wrongful raise of rates. In the same cases it was stated that after a breach of an insurance policy by a wrongful raise in rates, an insured was not required to make a tender each quarter, and that no tender was necessary to preserve rights of an insured under an old-line insurance policy on the notice of raise in rates given.

In *Pilgrims' Health & Life Ins. Co. v. Scott*, 78 S. E. 469, 12 Ga. App. 749, it was held that it was unnecessary for insured to tender the weekly premiums after the insurance company's agents had taken up his policy and notified him that they would receive no further premiums.

Under Laws N. C. 1909, c. 884 (Gregory's Supp. § 4779a), it has been held that, where insurer refused a check given by insured for premium as to which he did not receive notice before due, it could not defeat rights of beneficiary on ground that tender of premium was conditional and insufficient (*Aiken v. Atlantic Life Ins. Co.*, 173 N. C. 400, 92 S. E. 184).

2316-2318. (j) Remittance by mail or express

2316 (j). Where the premium was payable at the home office on a certain date, and the amount thereof was mailed too late for the remittance to reach its destination in due course of mail on or before date of payment, it was insufficient to prevent forfeiture.

Mutual Reserve Fund Life Ass'n v. Tuchfeld, 159 Fed. 833, 86 C. C. A. 657; *Illinois Life Ins. Co. v. McKay*, 64 S. E. 1131, 6 Ga. App. 285.

In *Mutual Reserve Fund Life Ass'n v. Tuchfeld*, 159 Fed. 833, 86 C. C. A. 657, though a policy provides that premiums shall be paid at the insurer's home office by a certain time; if, after issuance of the policy, the insurer authorizes or acquiesces in the sending of the premiums by mail, a deposit thereof in the mail, in time to reach the home office by the time the premium is due, will prevent forfeiture, though the premium does not in fact reach such office until after the due date.

2318-2319. (k) Payment by check, order, draft, or note

2318 (k). Where an insurance company accepts and retains a note, check, or other interest-bearing obligation for a premium, the policy will not be held to have lapsed or forfeited for nonpayment of premium, notwithstanding the note or other obligation is not

paid at maturity, in the absence of an express provision to that effect in the policy or notes.

Veal v. Security Mut. Life Ins. Co., 65 S. E. 714, 6 Ga. App. 721; *State Life Ins. Co. v. Chowning*, 113 Pac. 715, 27 Okl. 722; *Bradley v. Federal Life Ins. Co.*, 178 Ill. App. 524; *Occidental Life Ins. Co. v. Jacobson*, 15 Ariz. 242, 137 Pac. 869.

In *Hayes v. New York Life Ins. Co.*, 124 N. Y. Supp. 792, 68 Misc. Rep. 558, it was held that, in an action on a life insurance policy which had been forfeited for failure to pay a note given for a premium, it could not be contended that the note constituted payment, for, at most, it was merely prima facie payment, which was rebutted by the fact that insured had applied for reinstatement of the policy on the failure to pay the note, and had accepted the money which he had deposited on his application for reinstatement, and which had been returned to him on the failure of such application, thereby showing the intention of the parties, which is the test to be applied in such cases.

In *Bank of Commerce v. New York Life Ins. Co.*, 54 S. E. 643, 125 Ga. 552, it was held that a stipulation in an insurance policy that "a grace of one month, during which the policy remains in full force, will be allowed in payment of all premiums except the first, subject to an interest charge at the rate of five per cent. per annum," does not provide a grace of one month in the payment of a note given for a past-due premium.

In *Reppond v. National Life Ins. Co.*, 100 Tex. 519, 101 S. W. 786, 11 L. R. A. (N. S.) 981, 15 Ann. Cas. 618 reversing (Tex. Civ. App.) 96 S. W. 778, it was held that where a life insurance agent presents a policy to an applicant, and he declines to accept it, being unable to pay the first premium in full, and the agent accepts notes for his commission and cash for the company's share of the premium, the notes become the individual property of the agent, and are not subject to a provision in the policy for a forfeiture for nonpayment of a premium note, though the company acquired the notes from the agent.

In *National Life Ins. Co. v. Manning*, 86 S. W. 618, 38 Tex. Civ. App. 498, the policy provided that the premiums might be paid annually, semiannually, or quarterly, at insured's option, and specified the amounts to be paid in each instance. It was held that, insured having given his note for the whole second annual premium, he exercised his option to pay that premium annually, so that payments

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made on the note after maturity could not be treated as quarterly payments for the purpose of keeping the policy in force for a part of the year.

In *Kavanaugh v. Security Trust & Life Ins. Co.*, 117 Tenn. 33, 96 S. W. 499, 7 L. R. A. (N. S.) 253, 10 Ann. Cas. 680, the policy provided for annual payment of premiums and for reinstatement in case of forfeiture on execution of a certificate of health. In accordance with custom on the maturity of the premium, one-fourth was paid in cash, and 3 notes given for the balance; the notes providing that they were given on the express understanding that for any loss occurring by death after the note was due and unpaid the company should not be liable. On the maturity of the first note notice thereof was mailed but never received, and after nonpayment the company refused a tender promptly made on notice being received of the maturity of the note unless a health certificate was furnished, which insured was not then able to give. It was held that after the giving of the notes the rights of the parties were measured by the provisions thereof, and, insured not having died until after tender of the amount due, no forfeiture was incurred.

2319-2322. (1) Same—Accident insurance

2319 (1). In *Gilmore v. Continental Casualty Co.*, 58 Wash. 203, 108 Pac. 447, an accident policy stipulated that the premium should be paid in installments out of insured's wages for designated months. It was understood that the earnings of insured for any particular month were not to be paid until the latter end of the succeeding month, and that no remittance would be made on the premium until the arrival of the pay day, though funds were in the hands of the employer applicable to that purpose on the 1st day of the succeeding month. It was held that there was no default in the payment of an installment until the arrival of the pay day.

In *Lacy v. Continental Casualty Co.*, 170 Ill. App. 527, it was held that under a policy, which provided for payment of premiums by the employer of the insured in a particular manner set forth in the application for the policy, the insured had, by withdrawing certain wages earned by him, so affected the time of payment that such policy had lapsed at the time of his death; and where employer was directed to pay accident insurance premiums when due from wages then due, and employé was injured when premium had not been paid, although employer held wages for another month, the insurer could not collect the premium from such wages, and the

employé could not therefore recover insurance (*Travelers' Ins. Co. of Hartford, Conn., v. Atkinson* [Ala.] 73 South. 903).

2322-2324. (m) Payment or tender to agent or broker

2322 (m). Where an insurance company allowed an alleged agent to collect premiums and adjust a loss under a policy, it was afterwards estopped to deny the agent's authority to receive payment of premiums from the holder of this policy (*Courtney v. Fidelity Mut. Aid Ass'n*, 94 S. W. 768, 101 S. W. 1098, 120 Mo. App. 110). So, where a life policy was issued through an agent and put into effect by payment of the first premium to him, a tender to him of the second premium was made to one having authority to receive it, and insurer could not, to defeat a recovery on the policy, deny his authority (*Halsey v. American Central Life Ins. Co.*, 167 S. W. 951, 258 Mo. 659). And in *American Nat. Ins. Co. v. Collins* (Tex. Civ. App.) 149 S. W. 554, it was held that, where insurer claimed that the policy had lapsed for nonpayment of the second premium, plaintiff's plea that the agent to whom he paid was authorized to collect premiums generally, though his written contract limited his authority to first premiums, while not sufficient for estoppel, was proper as raising the issue of authority given outside the written contract. The provision in a life insurance policy that payments of premiums might be made to certain authorized persons, but only on production of the company's receipt, signed by the president or secretary, etc., is intended only to protect the insurer against unauthorized payments to local agents or collectors; and where the insurer knowingly accepts and retains premium money paid an agent, who does not give the required form of receipt, it waives the benefit of the provision (*Matthews v. Metropolitan Life Ins. Co.*, 147 N. C. 339, 61 S. E. 192, 18 L. R. A. [N. S.] 1219).

If a life policy is delivered and the premium paid to insurer's agent, the insurer is not relieved from liability merely because the agent failed to remit the premium (*Citizens' Nat. Life Ins. Co. v. Ragan*, 13 Ga. App. 29, 78 S. E. 683).

Where the insured repeatedly attempted to pay his premium, but the agent "firmly believed" that the same was not due, the fact that it was not paid is deemed the fault of the agent, and a lapse will not be held to have occurred notwithstanding the premium was actually due (*Continental Casualty Co. v. Johnson*, 119 Ill. App. 93). So, too, where an insurance agent had had charge of all insured's business for several years, under directions not to let a policy

expire unless told to do so, and under an arrangement whereby insured paid the premiums only on presentation of bills therefor, and whereby the agent kept a separate pigeon hole for insured's policies, there was a valid renewal of an accident policy by the agent attaching a renewal receipt to the original policy, charging the renewal premium to insured and crediting the insurer with the amount (*Washburn v. United States Casualty Co.*, 106 Me. 411, 76 Atl. 902).

In *Reppond v. National Life Ins. Co.*, 100 Tex. 519, 101 S. W. 786, 11 L. R. A. (N. S.) 981, 15 Ann. Cas. 618, reversing (Tex. Civ. App.) 96 S. W. 778, a life policy stipulated that it should be void on nonpayment of a premium note. The agent of the insurer testified that in settling for the first premium the insured gave him an order on his employer for a specified sum and executed notes for the balance, each payable to the agent; that the agent took the notes for the account of the insurer, and not for his personal account. A third person testified that he was present when the first premium was settled, and that insured paid the agent some money, and that the agent told insured to give him some money to pay the insurer for the policy for a year. The insurer did not receive any part of the premium in money, and the agent indorsed the notes to the insurer, which notes were never paid. It was held that the policy became void.

2324-2327. (n) Application of dividends, earnings, and other credits to prevent forfeiture

2324 (n). In *Provident Sav. Life Assur. Soc. v. King*, 117 Ill. App. 556, judgment affirmed 75 N. E. 166, 216 Ill. 416, it was held that an insurance policy which provides that it should stand renewed on payment each year of a specific premium does not lapse where the company holds funds to the credit of such policy which the assured has requested be applied in payment of the renewal of such policy.

Where money is absolutely due from an insurance company to a policy holder before the due date of his premium, the company should apply the credit, if necessary, to save the policy, and such application will be conclusively presumed to have been made, especially if such had been the custom of the company as to the particular policy.

American Nat. Ins. Co. v. Mooney, 111 Ark. 514, 164 S. W. 276; *McNaughton v. Des Moines Life Ins. Co.*, 122 N. W. 764, 140 Wis. 214; *Citizens' Life Ins. Co. v. Boyle*, 139 Ky. 1, 129 S. W. 303; *John-*

son v. Fidelity & Casualty Co. of New York, 184 Mich. 408, 151 N. W. 593, L. R. A. 1916A, 475; Mutual Life Ins. Co. v. Henley, 188 S. W. 829, 125 Ark. 372; Kern v. Western Life Indemnity Co., 192 Ill. App. 98.

Similarly, in *North American Acc. Ins. Co. v. Bowen* (Tex. Civ. App.) 102 S. W. 163, it was held that it was the duty of the insurer to apply so much of the sum due the insured to the payment of unpaid notes as was necessary for that purpose to prevent a forfeiture of the policy.

In *Cilek v. New York Life Ins. Co.*, 95 Neb. 274, 145 N. W. 693, under a 20-year endowment life insurance policy entitling insured to his share of accumulated profits only at the end of 20 years, providing premiums were duly paid to that date (June 13, 1919), it was held, that the beneficiary was not entitled to have any profits credited to the policy in order to keep it in force.

In *Perkins v. Empire Life Ins. Co.*, 17 Ga. App. 658, 87 S. E. 1094, a stipulation of an insurance policy that failure to pay any premium when due would make the policy void was held not to apply, where there was a loan value attached to the policy sufficient to pay the premium due.

However, a contrary result was reached in *Blalock v. Empire Life Ins. Co.*, 13 Ga. App. 486, 79 S. E. 374, under the provisions of a life insurance policy relating to loans, when construed in connection with an "automatically nonforfeitable" clause; and under so-called "board contract," insured could not avoid forfeiture for nonpayment of premium on the ground that his policies entitled him to a sufficient commission from his premium to have paid it, where he did not in fact pay such premium (*Underwood v. Security Life & Annuity Co. of America* [Tex.] 194 S. W. 585).

In *Reed v. Bankers' Reserve Life Ins. Co.* (C. C.) 192 Fed. 408, failure to notify an insured of the amount of a dividend applicable on a premium was held to be a waiver of the right to declare a forfeiture for nonpayment of the premium.

In *Security Life & Annuity Co. of America v. Underwood* (Tex. Civ. App.) 150 S. W. 293, it was held that where the cash part of a quarterly premium due in June and payable in advance was unpaid, the insured had no right to require the company to apply thereon a distribution of less than the full cash part of the premium, paid some time in August under an independent "board contract," since he had no right to require the acceptance of less than the full cash part of the premium.

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A similar case is *Terry v. State Mut. Life Ins. Co. of Rome, Ga.*, 72 S. E. 498, 90 S. C. 1, where a life policy issued to insured and payable to plaintiff provided for annual premiums of \$16.32, the first of which carried the contract to November 28, 1906. Insured was notified that the second annual payment would be due on that date, and that he had a credit dividend of \$2.45 applicable either to the payment of the premium for the succeeding year or convertible into paid-up insurance. The policy provided for 30 days' grace in the payment of premiums, and also that every policy holder at the time any premium fell due might pay a semiannual or quarterly premium according to the association's schedule, which would continue the policy for the time paid for. Insured paid no further premium, and died on January 10, 1907. The quarterly premium, if paid on November 28, 1906, would have amounted to \$4.33, and the dividend, if applicable to the payment of the premium for a less period than three months, would have been sufficient to carry the policy beyond the date of insured's death. It was held that three months was the shortest period for which a premium was payable under the contract, and, the dividend being insufficient to pay the premium for that period, the policy lapsed.

2327. (o) Part payment

2327 (o). The payment of premiums, as prescribed in a life insurance policy, is necessary to keep it in force. Even acceptance of a partial payment will not keep the policy alive for a proportional part of the year.

Clifton v. Mutual Life Ins. Co. of New York, 168 N. C. 499, 84 S. E. 817; *Battin v. Northwestern Mut. Life Ins. Co.*, 143 Fed. 473, 74 C. C. A. 459.

2327-2328. (p) Effect of receipt

2327 (p). In *Sexton v. Greensboro Life Ins. Co.*, 157 N. C. 142, 72 S. E. 863, it was held that a receipt for the premium, pinned to a note for the premium, is not evidence of payment, where it has not been delivered by insurer to insured, and where insurer produces it in court, pursuant to notice.

2328-2332. (q) Excuse for nonpayment

2330 (q). Where a life policy is improperly canceled by insurer and the beneficiary has knowledge thereof, no duty devolves on her to tender subsequent premiums.

Baumann v. Metropolitan Life Ins. Co., 144 Wis. 206, 128 N. W. 864; *Indiana Nat. Life Ins. Co. v. McGinnis*, 180 Ind. 9, 101 N. E. 289,

45 L. R. A. (N. S.) 192, reversing judgment (App.) 99 N. E. 751; Id., 180 Ind. 701, 101 N. E. 295, reversing judgment (App.) 99 N. E. 756; *Baumann v. Metropolitan Life Ins. Co.*, 144 Wis. 206, 128 N. W. 864.

In *Western & Southern Life Ins. Co. v. Giltneane*, 163 S. W. 192, 157 Ky. 275, where an insurance company after having obtained possession of a policy issued, for the purpose of issuing additional insurance, refused to receive any further premiums thereon, on the ground that insured was not then an insurable risk, it was held that insured was not in default for thereafter failing to tender premiums.

The policy was not forfeited for nonpayment of premiums for several months, where the company's collector failed to call for the same as he had been doing and as he agreed to continue to do.

Mutual Life Ins. Co. of New York v. Davis (Tex. Civ. App.) 154 S. W. 1184; *Rutherford v. Prudential Ins. Co.*, 73 N. E. 202, 34 Ind. App. 531; *Sterling Life Ins. Co. v. Rapps*, 130 Ill. App. 121; *National Life Ins. Co. of United States v. Eggleston* (Tex. Civ. App.) 195 S. W. 942.

Where an insurer refuses to accept a premium on the ground that it is tendered too late, insured is not required to make further tenders on recurring premium dates.

Reed v. Provident Sav. Life Assur. Soc. of New York, 82 N. E. 734, 190 N. Y. 111, modifying 98 N. Y. Supp. 1111, 112 App. Div. 922; *Bohles v. Prudential Ins. Co. of America*, 83 N. J. Law, 246, 83 Atl. 904; *State Mut. Life Ins. Co. v. Forrest*, 19 Ga. App. 296, 91 S. E. 428.

So forfeiture of an insurance policy cannot be predicated upon nonpayment of an assessment which was excessive, both under the contract itself and as modified by a foreign judgment (*Barber v. Hartford Life Ins. Co.*, 269 Mo. 21, 187 S. W. 867, 874).

In *Knoebel v. North American Acc. Ins. Co.*, 135 Wis. 424, 115 N. W. 1094, 20 L. R. A. (N. S.) 1037, it was held that the course of the company in uniformly sending notice, together with the previous representations as to the apparent importance of sending the book with the premium, estopped it from insisting on payment without notice, as required by the terms of the policy.

In *Johnson v. Standard Life & Accident Ins. Co.* (Tex. Civ. App.) 97 S. W. 831, a policy, insuring a railroad employé against accident, was stated to be in consideration of the "order (on the railroad) which is to be considered an assignment of moneys therein specified." The railroad company was the agent of the insurance company, and insured had been told by the insurance agent that he

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need only give the assignment, directing the railroad company to pay the premiums, and they would be deducted as his hospital fees. The order having been given, the insured, who could read but little, demanded of the railroad company all due him, and received it, without deduction of a premium due. He did not know what was due him, and thought the premium had been deducted. It was held that the company was not in a position to claim a forfeiture under a clause, stipulating that the policy should be void, if the insured failed to leave with the company any installment of premiums.

Under a condition in a policy of health and accident insurance, voiding it for nonpayment of premiums, failure to pay is not excused by illness of the insured, and failure to pay the premium after illness for one month terminates liability beyond that time (*Rocci v. Massachusetts Accident Co.*, 110 N. E. 972, 222 Mass. 336).

2332. (r) Same—Disappearance of insured

2332 (r). Relief asked by suit to restore a lapsed life insurance policy by an administrator of insured must be denied, where plaintiff, administrator of insured, had knowingly failed to make payments necessary to keep the policy alive during absence of insured after unexplained disappearance (*Murphy v. Metropolitan Life Ins. Co.*, 155 N. Y. Supp. 1062, 92 Misc. Rep. 479).

4. FORFEITURE OF MUTUAL BENEFIT CERTIFICATES FOR NON-PAYMENT OF DUES AND ASSESSMENTS

2336-2338. (a) Nature and validity of condition of forfeiture

2336 (a). It is competent for a mutual benefit society and a member to contract that the failure to make payment of dues or assessments within the time prescribed shall work a forfeiture or suspension without notice to or demand on the member.

Britt v. Sovereign Camp of Woodmen of the World, 153 Mo. App. 698, 134 S. W. 1073; *Gruwell v. National Council of Knights and Ladies of Security*, 104 S. W. 884, 126 Mo. App. 496; *Supreme Council Catholic Benevolent Legion v. Grove*, 176 Ind. 356, 96 N. E. 159, 36 L. R. A. (N. S.) 913; *Burke v. Grand Lodge, A. O. U. W. of Missouri*, 118 S. W. 493, 136 Mo. App. 450; *Knights of Columbus v. Burroughs' Beneficiary*, 107 Va. 671, 60 S. E. 40, 17 L. R. A. (N. S.) 246; *Schelber v. Protected Home Circle*, 146 Ill. App. 574; *Kennedy v. Grand Fraternity*, 92 Pac. 971, 38 Mont. 325, 25 L. R. A. (N. S.) 78; *Knode v. Modern Woodmen of America*, 157 S. W. 818, 171 Mo. App. 377; *Burchard v. Western Commercial Travelers' Ass'n*, 123 S. W. 973, 139 Mo. App. 606; *Crawford v. North American*

Union, 193 Mo. App. 443, 182 S. W. 1048; Oldham v. Supreme Lodge, Modern Brotherhood of America, 157 S. W. 92, 170 Mo. App. 564.

In Brittenham v. Sovereign Camp Woodmen of the World, 167 S. W. 587, 180 Mo. App. 523, it was held that an agreement providing for a forfeiture in case assessments are not paid on an insurance certificate issued by a fraternal association will be enforced regardless whether the condition be considered precedent or subsequent.

2338-2341. (b) Construction of condition

2338 (b). Under the rule of a mutual benefit society providing that if a member shall fail to pay his dues or assessments within a prescribed time he shall become suspended by his own act and his certificate shall be void, the mere failure of a member to pay within the prescribed time works a forfeiture of his certificate.

Knode v. Modern Woodmen of America, 157 S. W. 818, 171 Mo. App. 377; Labranche v. St. Jean Baptiste Society, 81 Atl. 698, 78 N. H. 237; Houle v. Société St. Jean Baptiste, 116 N. W. 1076, 153 Mich. 357; Valentine v. Grand Lodge, A. O. U. W., of California, 17 Cal. App. 317, 119 Pac. 671; Giniiso v. Calabrian American Citizens' Mut. Benefit Ass'n, 121 N. Y. Supp. 209, 66 Misc. Rep. 162; Burchard v. Western Commercial Travelers' Ass'n, 123 S. W. 973, 139 Mo. App. 606; United Order of the Golden Cross v. Hooser, 160 Ala. 334, 49 South. 354; Knights of Columbus v. Burroughs' Beneficiary, 107 Va. 671, 60 S. E. 40, 17 L. R. A. (N. S.) 246; National Council of Knights and Ladies of Security v. Burch, 126 Ill. App. 15; Wall v. Brotherhood of Painters, 165 Ill. App. 59; Sevigny v. Société St. Jean Baptiste, 90 Atl. 744, 36 R. I. 374; Makman v. Independent Order Free Sons of Judah, 148 N. Y. Supp. 141, 86 Misc. Rep. 18; Stack v. Williams, 166 App. Div. 190, 151 N. Y. Supp. 185; Modern Brotherhood of America v. Beshara, 142 Pac. 1014, 42 Okl. 684; Beeman v. Supreme Lodge, Shield of Honor, 29 Pa. Super. Ct. 387; Kennedy v. Grand Fraternity, 92 Pac. 971, 36 Mont. 325, 25 L. R. A. (N. S.) 78; Gifford v. Workmen's Ben. Ass'n, 72 Atl. 680, 105 Me. 17, 17 Ann. Cas. 1173; Supreme Council Catholic Benevolent Legion v. Grove, 176 Ind. 356, 96 N. E. 159, 36 L. R. A. (N. S.) 913.

Where a contract of life insurance stipulates that on default of a member in payment of dues he shall be liable to suspension, affirmative action on the part of the society to terminate the membership is contemplated.

Kennedy v. The Grand Fraternity, 92 Pac. 971, 36 Mont. 325, 25 L. R. A. (N. S.) 78; Burchard v. Western Commercial Travelers' Ass'n, 123 S. W. 973, 139 Mo. App. 606; Grand Lodge, F. & A. M. of

Texas, v. Dillard (Tex. Civ. App.) 162 S. W. 1173; *Weinberg v. Woodward*, 124 N. Y. Supp. 480, 67 Misc. Rep. 283; *Roulo v. Schiller Bund*, 172 Mich. 557, 138 N. W. 244; *Knights of Columbus v. Burroughs' Beneficiary*, 107 Va. 671, 60 S. E. 40, 17 L. R. A. (N. S.) 246.

In *Burchard v. Western Commercial Travelers' Ass'n*, 123 S. W. 973, 139 Mo. App. 606, it was held that it is only where the language of the by-laws of a beneficial association permit of no other construction that the mere failure to pay an assessment in time will be held to ipso facto work a suspension or forfeiture.

In *Brown v. Knights of the Protected Ark*, 43 Colo. 289, 96 Pac. 450, a certificate of a mutual benefit society provided that all the benefits accruing should be "liable to forfeiture" if the member did not comply with the association's constitution and by-laws, one of which declared that, in case of omission to pay dues and assessments on the first of each month, the member should stand suspended. It was held that the phrase "liable to forfeiture," when construed in connection with the by-laws, part of the contract making the default itself operate as a forfeiture did not require affirmative action on the part of the association before a member's rights could be barred.

In *Brooks v. Conservative Life Ins. Co.*, 106 N. W. 913, 132 Iowa, 377, 119 Am. St. Rep. 560, 11 Ann. Cas. 339, however, it was held that under a provision in a life insurance contract that if the insured fails to pay assessments and dues within 30 days after they are due, he shall be suspended and his contract become null and void, when construed in connection with a further provision that a member who has been suspended for nonpayment of dues and assessments, may be reinstated on payment of back dues and furnishing a certificate of good health, the mere failure to pay dues does not of itself work a suspension, but some affirmative act on the part of the insurer is necessary.

In *Valentine v. Grand Lodge A. O. U. W. of California*, 17 Cal. App. 317, 119 Pac. 671, it was held that a member of a fraternal benefit society may forfeit his rights under a certificate without being suspended from the society, and the laws of the society for suspension for nonpayment of dues do not control the special provisions of the contract for forfeiture of the certificate for nonpayment of dues.

In *Travelers' Protective Ass'n of America v. Roth* (Tex. Civ. App.) 108 S. W. 1039, it was held that a constitutional provision of

an accident insurance association that beneficiaries of a member killed while dues are delinquent shall receive nothing, as to the word "killed," refers to the time of the act producing death, rather than to the time of death produced by the act, and denies recovery by a beneficiary of a member who was in default at the time he sustained the injury resulting in his death, though at his death he had been reinstated, and was in good standing.

Various particular conditions in policies were construed in the following cases:

Bange v. Supreme Council Legion of Honor of Missouri, 105 S. W. 1092, 128 Mo. App. 461; *Rewitzer v. Switchmen's Union of North America*, 98 N. Y. Supp. 974, 112 App. Div. 708; *Taddonio v. Brotherhood Society of Pomaricus, Niccolo Fiorentino* (Sup.) 136 N. Y. Supp. 45; *Placa v. Polizzi Generosa Society of New York* (Sup.) 138 N. Y. Supp. 822; *Morrison v. Mutual Benev. Ass'n of Chesterfield County*, 59 S. E. 27, 78 S. C. 398; *Leech v. Order of R. Telegraphers*, 109 S. W. 811, 130 Mo. App. 5; *Grand Lodge (Colored) K. P. of Mississippi v. Jones*, 100 Miss. 467, 56 South. 458.

2341-2343. (c) By-laws and effect of changes therein

2341 (c). In *Brown v. Knights of the Protected Ark*, 43 Colo. 289, 96 Pac. 450, it was held that where a certificate of a mutual benefit society provided that it should be forfeited if the member did not comply with the conditions of the constitution and by-laws, and with such laws as were or might thereafter be adopted by the society, a by-law subsequently adopted, making assessments and dues payable on the first day of each month, and declaring that members should stand suspended from that day if dues and assessments were not paid with the right to reinstatement within 10 days on payment, and within 30 days on a certificate of health in addition, superseded a by-law in force at the time the certificate was issued, under which dues were payable on the 15th day of each month and members were not to be suspended for failure in that regard until the first day of the succeeding month.

On the other hand, where the by-laws are made a part of the contract of insurance, the time stated in them for the payment of monthly dues cannot be changed without the specific consent of the assured so as to place him in default on failure to conform to the more drastic provisions of the amendment (*Benjamin v. Bankers' Union of the World*, 173 Ill. App. 620).

2344-2349. (d) Default as ground of forfeiture in general

2344 (d). Where a condition of forfeiture in a contract of insurance between a mutual benefit society and a member is self-

executing, a member who is in default in his payments to the association loses his rights as a member and is not in good standing within the meaning of his certificate.

Jenkins v. Ancient Order of United Workmen of Kansas, 93 Kan. 324, 144 Pac. 223; *Grayson v. Grand Temple and Tabernacle in State of Texas of Knights and Daughters of Tabor of the International Order of Twelve* (Tex. Civ. App.) 171 S. W. 489; *Kligger v. Supreme Commandery United Order of Golden Cross*, 78 N. E. 469, 192 Mass. 326; *Odd Fellows' Ben. Ass'n v. Burton*, 83 Ark. 631, 104 S. W. 163; *Wilkie v. National Council, Junior Order United American Mechanics*, 68 S. E. 579, 151 N. C. 527; *Odd Fellows' Benefit Ass'n v. Smith*, 101 Miss. 332, 58 South. 100; *Hawkins v. Lone Star Ins. Union* (Tex. Civ. App.) 146 S. W. 1041; *Wilkie v. National Council J. O. U. A. M. of United States of North America*, 147 N. C. 637, 61 S. E. 580; *Sovereign Camp Woodmen of the World v. Ogden*, 107 N. W. 860, 76 Neb. 643; *Locomotive Engineers' Mut. Life & Accident Ins. Ass'n v. Bobo*, 8 Ga. App. 149, 68 S. E. 842; *O'Toole v. Jennings*, 106 N. E. 601, 219 Mass. 105; *Day v. Supreme Forest, Woodmen Circle*, 174 Mo. App. 260, 156 S. W. 721; *Independent Order of Foresters v. Cunningham*, 127 Tenn. 521, 156 S. W. 192; *Easter v. Brotherhood of American Yeomen*, 154 Mo. App. 456, 135 S. W. 964; *Geddes v. Ann Arbor Railroad Employes' Relief Ass'n*, 178 Mich. 486, 144 N. W. 828; *Fletcher v. Supreme Lodge Knights and Ladies of Honor* (Tex. Civ. App.) 135 S. W. 201; *Munger v. Brotherhood of American Yeomen*, 176 Iowa, 291, 154 N. W. 879; *Haycock v. Sovereign Camp, Woodmen of the World*, 162 Wis. 116, 155 N. W. 923; *Mutual Aid Union v. Wadley*, 188 S. W. 1168, 125 Ark. 449; *Sovereign Camp, Woodmen of the World, v. Shaw*, 85 S. E. 827, 143 Ga. 559.

In *Gruwell v. National Council of Knights and Ladies of Security*, 104 S. W. 884, 126 Mo. App. 496, it was held that, in the absence of any stipulation for forfeiture on the ground of nonpayment, the policy remains in force during the lifetime of the insured, however delinquent he may become with respect to agreed payments. So a member could not be lawfully suspended from beneficiary association for nonpayment of dues after he was found to have died, and beneficiaries proving the fact and date of death would not be bound to keep such dues paid to preserve their right to receive the benefits accruing by virtue of insured's membership at his death (*Linne-weber v. Supreme Council Catholic Knights of America*, 158 Pac. 229, 30 Cal. App. 315).

2348 (d). Failure of member of fraternal benefit association to pay assessment not legally imposed does not forfeit the certificate.

Supreme Council Catholic Knights of America v. Logsdon, 183 Ind. 183, 108 N. E. 587; *King v. Physicians' Casualty Ass'n of America*, 97

Neb. 637, 150 N. W. 1010; *Ibs v. Hartford Life Ins. Co.*, 121 Minn. 310, 141 N. W. 289, Ann. Cas. 1914C, 798; *Benjamin v. Mutual Reserve Fund Life Ass'n*, 79 Pac. 517, 146 Cal. 34; *Wayland v. Western Life Indemnity Co.*, 148 S. W. 626, 166 Mo. App. 221; *Burchard v. Western Commercial Travelers' Ass'n*, 123 S. W. 973, 139 Mo. App. 606.

So it was held that, when a forfeiture of an insurance policy is claimed, the existence of the precise condition, which under the contract worked its termination, must be clearly shown, and, if such condition be failure to pay a membership assessment, it must appear that such assessment was made by the persons and under the conditions and for the amount provided in the contract (*Burchard v. Western Commercial Travelers' Ass'n*, 123 S. W. 973, 139 Mo. App. 606).

Where the constitution and by-laws of an association provide that a member cannot be suspended for nonpayment of dues while sick, it is immaterial that during her sickness she had stated that she knew she was in arrears, that she did not intend to pay any dues, and did not wish to keep up the insurance (*Grand Temple & Tabernacle in the State of Texas of the Knights & Daughters of Tabor of the International Order of Twelve v. Counts* [Tex. Civ. App.] 157 S. W. 1180). In *Independent Order of Sons and Daughters of Jacob of America v. Moncrief*, 96 Miss. 419, 50 South. 558, the by-laws of an order forfeited membership on the failure of the member to pay dues. The order was authorized to provide a sick benefit for a sick member; but a member became entitled to such a benefit on the condition that the order had taken action and had voted him an allowance. The order made no allowance for a member, who was sick, and who did not pay dues from July to December, the date of her death. It was held that the membership was forfeited for nonpayment of dues, as the order was not required to pay the dues out of sick benefits.

Where the payment of monthly dues and assessments was made a prerequisite to liability of a fraternal order on its certificates of insurance, but the laws provided that, in case of sickness and inability to pay, the member, by notifying his camp, would be kept in benefit under certain conditions, the failure for three months preceding a member's death to pay dues and assessments is fatal to the liability of the order on a certificate, in the absence of any such notice (*Sterling v. Head Camp*, Pacific Jurisdiction, *Woodmen of the World*, 80 Pac. 375, 28 Utah, 505, rehearing denied 80 Pac. 1110, 28 Utah, 526). In *Kelly v. Court R. F. Phelan*, No. 122, *Foresters of*

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America, 60 Atl. 1022, 78 Conn. 40, it was held that where the by-laws of a beneficial association defined a member in good financial standing, entitled to share in death benefits, as one who was not indebted to a subordinate court for fines or assessments or anything else that may be charged against him as dues to an amount equal to six months' dues, the beneficiary of a member was not entitled to recover benefits where he was indebted to an amount exceeding six months' dues, though, in order to make such indebtedness, he was charged with a dollar for lottery tickets issued by the society in connection with a fair, for which he had failed to account.

In the following cases the insured was held not to have been in default in payment of assessments:

Kelly v. Ancient Order of Hibernians Ins. Fund, 113 Minn. 355, 129 N. W. 846; *Gage v. Dettling*, 143 N. Y. Supp. 767, 82 Misc. Rep. 370; *Fitzpatrick v. Knights of Columbus*, 100 N. E. 1127, 206 N. Y. 726, affirming judgment 128 N. Y. Supp. 366, 143 App. Div. 540; *Grand Court of Texas Independent Order of Calanthe v. Johns* (Tex. Civ. App.) 181 S. W. 869.

2350-2353. (c) Necessity of notice of time for payment

2350 (c). In the absence of a statute or law of the society requiring notice as a condition precedent to the payment of fixed dues, such notice is not a prerequisite to a forfeiture for nonpayment of the dues (*Loyal Protective Ins. Co. v. Walker*, 126 Ark. 296, 189 S. W. 1050). Where, however, notice of an assessment is required by the laws of a mutual benefit society, there can be no forfeiture on the ground of nonpayment, unless the notice is given.

Bange v. Supreme Council Legion of Honor of Missouri, 153 Mo. App. 154, 132 S. W. 276; *Locomotive Engineers' Mut. Life & Accident Ins. Ass'n v. Bobo*, 8 Ga. App. 149, 68 S. E. 842; *Supreme Council Catholic Benevolent Legion v. Grove*, 176 Ind. 356, 96 N. E. 159, 36 L. R. A. (N. S.) 913; *Home Benefit Ass'n of Angelina County v. Jordan* (Tex. Civ. App.) 191 S. W. 725.

In *Hawkins v. Lone Star Ins. Union* (Tex. Civ. App.) 146 S. W. 1041, the policy in a mutual benefit association was held notice to the insured of conditions as to payment necessary to keep the policy in force.

In *Geddes v. Ann Arbor Railroad Employés' Relief Ass'n*, 178 Mich. 486, 144 N. W. 828, it was held that, if one insured in an employés' mutual benefit association actually knew that his premiums had not been paid from the fact that he had drawn his full

wages each month and had not otherwise paid them, it was not necessary that he be given notice by the association of that fact, even if the policy required such notice.

In *Sheridan v. Modern Woodmen of America*, 44 Wash. 230, 87 Pac. 127, 7 L. R. A. (N. S.) 973, 120 Am. St. Rep. 987, the by-laws of a mutual benefit insurance association provided that no officer of any local camp was authorized to waive any of the provisions of the laws of the association; declared the clerk of the local camp to be the agent of such camp, and provided that no act on his part should have the effect of creating a liability on the part of the association. The by-laws provided for the giving of notice of assessments, and that a failure to pay any assessment should ipso facto work a suspension. After a member became insane, the mother of his minor child, who was the beneficiary, obtained an agreement from the clerk of the local camp that he would notify her of assessments. It was held that such an agreement was not binding on the association, and it might rely on a forfeiture after such notice as was provided for in the original contract, though the clerk failed to give the notice promised.

In *Haynes v. Masonic Ben. Ass'n*, 98 Ark. 421, 136 S. W. 187, Ann. Cas. 1912D, 697, the constitution of the masonic benefit association, of which plaintiff's decedent was a Master Mason, provided that the secretary of the Grand Lodge should give quarterly notice to the masters of every lodge of an assessment against each Master Mason in good standing at the time of notice, and that, unless such assessments were paid within 30 days from such notice, any Master Mason should be ipso facto suspended until his assessments were paid. It was held that the assessment was a fixed and regular assessment, and that notice to each Master Mason was not contemplated. It was said in the same case that where assessments under the laws of a masonic benefit association are irregular in amount or time of payment, or become payable only when notice thereof is given to subordinate lodges, the members of such lodges are not in default until notice in conformity with the laws of the association is given, and they have failed to pay.

2353-2354. (f) Time of giving notice

2353 (f). In *Bange v. Supreme Council Legion of Honor of Missouri*, 179 Mo. App. 21, 161 S. W. 652, it was held that to sustain a forfeiture for nonpayment of contributions, it must appear that the notice of suspension was received by the member in time

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for him to have acted upon it, where it was not delivered to his regular address.

2354-2356. (g) Form and requisites of notice

2354 (g). Where the laws of a benefit society expressly provide the manner of giving a notice, that manner must be followed, and no other will suffice, in the absence of a custom or contract binding upon the member to receive notice in a different manner.

Bange v. Supreme Council Legion of Honor of Missouri, 179 Mo. App. 21, 161 S. W. 652; *Grand Lodge (Colored) K. P. of Mississippi v. Jones*, 100 Miss. 467, 56 South. 458; *Haywood v. Grand Lodge of Texas, K. P. (Tex. Civ. App.)* 138 S. W. 1194; *Haynes v. Masonic Ben. Ass'n*, 98 Ark. 421, 136 S. W. 187, Ann. Cas. 1912D, 697.

2356-2361. (h) Mode and sufficiency of notice

2356 (h). In *Bange v. Supreme Council Legion of Honor of Missouri*, 105 S. W. 1092, 128 Mo. App. 461, it was held that if the member actually received the notice, it would be sufficient to effect a suspension upon nonpayment of dues within the required time. It was said in the same case that where a by-law of a mutual benefit association provided that a notice to pay dues should be directed to the regular address of the member and deposited in the post office, which should be sufficient notice to bind a member, and it was the custom of the association to give the notice contemplated, a member would not be suspended until notice of a call for a contribution had been sent to him at his regular address.

An insurer is only bound to give the insured notice of assessments against her in the manner and for the length of time provided for in the certificate of membership. (*Mutual Aid Union v. Wadley*, 188 S. W. 1168, 125 Ark. 449).

Under the laws of a fraternal benefit insurance company, making notice by registered mail to the last known address of a delinquent member sufficient, it is immaterial that the secretary knew the member had moved from New York to Hungary (*Goldberger v. United States Grand Lodge, Order Brith Abraham*, 136 N. Y. Supp. 13, 77 Misc. Rep. 136). If it is the duty of an insurance company to mail a notice of an assessment, in order to sustain a forfeiture for nonpayment it must show affirmatively that the notice was mailed, properly addressed within the time fixed (*Duffy v. Fidelity Mut. Life Ins. Co.*, 55 S. E. 79, 142 N. C. 103, 7 L. R. A. [N. S.] 238; *Id.*, 59 S. E. 1131, 143 N. C. 697). Where the constitution of a benefit society, provides that printed notices of assess-

ment "shall be made and sent" as the society may provide, and that the official organ of the society, appearing on the first day of each month, shall be an official notice of assessment to each member this requires that a notice of assessment be sent to a member, and publishing a notice of assessment in the official newspaper, does not amount to sending a notice (*Grand Legion of Illinois Select Knights of America v. Beaty*, 79 N. E. 565, 224 Ill. 346, 8 L. R. A. [N. S.] 1124, 8 Ann. Cas. 160, affirming 117 Ill. App. 657).

Unauthorized notice of death assessment by officer of defendant is not ratified by entry in minutes of subsequent lodge meeting: "W. O., Deceased. Death Benefit—Died May 26th. \$700.00" (*Zender v. Detroit Lodge No. 1 of Knights of Royal Ark*, 190 Mich. 624, 157 N. W. 361).

Whether assessments mailed to insurer in Boston at 8:50 a. m. January 7th were received by it at Marlborough before insured's death, at 1:20 a. m. January 8th, is a question for the jury (*Crowley v. A. O. H. Widows' and Orphans' Fund*, 110 N. E. 276, 222 Mass. 228). And defendant's allegation of notice to plaintiff's intestate through medium of its official publication properly mailed to him is not proven by testimony which did not show that the paper was actually put in the post office, or to what post office it was addressed (*Gibson v. Iowa Legion of Honor [Iowa]* 159 N. W. 639).

2361-2364. (I) Time of payment

2361 (i). Where a contract of insurance stipulates that the failure of the assured to pay monthly dues within the time prescribed shall result in the forfeiture of his rights, time is, as a general rule, of the essence, and a failure to make payment at the appointed time works an absolute forfeiture (*Kennedy v. The Grand Fraternity*, 92 Pac. 971, 36 Mont. 325, 25 L. R. A. [N. S.] 78). If, however, at the time of the death of a member an assessment is due and payable, a recovery by the beneficiary will not be defeated where it appears that the by-laws of the society provided for certain days of grace which at the time of such death had not elapsed (*Grand Legion of Illinois, Select Knights of America v. Beaty*, 117 Ill. App. 657, affirmed 79 N. E. 565, 224 Ill. 346, 8 L. R. A. [N. S.] 1124, 8 Ann. Cas. 160).

In *Hobson v. Occidental Mut. Ben. Ass'n*, 126 Pac. 642, 87 Kan. 515, it was held that where the by-law of a benefit association, providing that assessment No. 1 of each year shall be due on or

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before January 1st, and No. 2 on or before February 1st, and so on, is amended to provide that monthly payments shall be payable on or before the 1st of each month, and No. 60, for January, 1905, shall be due on or before the 1st of February, and so on, and where insured paid the January assessment in 1905 before January 1st, the tender of the February assessment on February 3d and February 10th was in time.

Where the secretary testified that dues were paid to December 25th, and the member died January 19th, when the time for payment of the January dues had not expired, a peremptory instruction for plaintiff was proper (*Berryhill v. Supreme Tribe of Ben Hur*, 167 Mo. App. 530, 152 S. W. 93).

2365-2366. (j) Extension of time

2365 (j). In *Watkins v. Brotherhood of American Yeomen*, 188 Mo. App. 626, 176 S. W. 516, it was held that a payment of a member's dues in a benefit association 60 days after delinquent without a health certificate, as customarily permitted by it, is valid, and effective as if paid when due, being authorized by the member when well, though when made he was unconscious from a fatal injury. So in *Falkinberg v. Modern American Fraternal Order*, 149 Ill. App. 622, it was held that, if there was a custom and well-established practice prevailing among the members and officers of an insurance order by force of which a payment made to the secretary of the local lodge at any time before or upon the 10th day of each month was treated as having been made in apt time and that members so paying were not in default, upon proof of such custom and compliance therewith, the defense of default in payment was completely met.

In *Dillon v. National Council of Knights and Ladies of Security*, 148 Ill. App. 121, affirmed 91 N. E. 417, 244 Ill. 202, however, it was held that evidence of a custom to extend leniency with respect to the payment of assessments is immaterial upon the question of delinquency. And where local lodge or its secretary makes payments for the insured at his request as a loan, that insured does not return loan as agreed will not establish association's custom to extend time of payment (*Chandler v. Royal Highlanders* [Neb.] 162 N. W. 642).

In *Spinks v. Mutual Reserve Fund Life Ass'n* (C. C.) 137 Fed. 169, the policy expressly provided that a failure to make any payment of dues for expenses or mortuary premiums, as provided, should render the contract null and void, but declared that when

the policy had been in force for five years, and insured died before the expiration of ten years, within six months from the date of the maturity of dues unpaid, or within six months from the date of mortuary calls unpaid, the certificate should, nevertheless, be payable as though payment of such dues or mortuary premium had been made when due. It was held that such extension provision gave insured an extension of six months as to both annual dues and mortuary premiums, so that, if either was not paid within such extended period, the policy was forfeited.

Where by-laws required payment of assessment within 30 days of notice, and illegal notice was issued May 26th, which was validated at lodge meeting on July 11th, such action is a time extension rendering tender of payment on August first in time to prevent default (*Zender v. Detroit Lodge No. 1 of Knights of Royal Ark*, 190 Mich. 624, 157 N. W. 361).

2368-2371. (1) Payment or tender of premiums in general

2368 (1). Though, if it was customary for the members of a benefit society to send checks for assessments by mail, a member was not negligent in using the mails for that purpose (*Coile v. Order of United Commercial Travelers of America*, 161 N. C. 104, 76 S. E. 622). Yet it has been held in some cases that the mailing of a check is not payment until it is received.

Beeman v. Supreme Lodge Shield of Honor, 29 Pa. Super. Ct. 387;
Roth v. Travelers' Protective Ass'n, 102 Tex. 241, 115 S. W. 31, 132 Am. St. Rep. 871, 20 Ann. Cas. 97, affirming (Tex. Civ. App.) 108 S. W. 1039.

In *Wood v. Iowa Legion of Honor*, 133 Iowa, 33, 110 N. W. 164, a member of a fraternal insurance association was a banker, in whose bank the treasurer of the local lodge kept his account. Before the date on which the last assessment made in the lifetime of the banker was due, the treasurer, pursuant to his practice, had entered on his books the assessment of the banker as paid. The treasurer, when ready to forward his collection, learned of the banker's death, but included in his remittance such member's assessment. It was held that the association could make no claim under the provision of its laws that a failure to pay an assessment within the time allowed therefor should work a suspension of the member.

In *Fitzpatrick v. Knights of Columbus*, 128 N. Y. Supp. 366, 143 App. Div. 540, rehearing denied, 144 App. Div. 936, 129 N. Y. Supp. 1122, the by-laws of the order of which insured was a member al-

lowed subordinate councils to provide a loan fund for their members to avoid forfeitures, and required payments to be made to the general order within 40 days from the 1st of the preceding month. The council of which insured was a member had such a loan fund, and insured was accustomed to pay through that method. There was also a rule requiring members to pay their assessments to the local treasurer within 30 days. Insured died on August 4th; the last preceding assessment having been made as of July 1st. It was held that insured, having availed himself of the method provided in the by-laws for just such cases, had a right to rely on the local officer making payment for him, so that he was not in default when he died.

In *Walton v. Fraternal Aid Ass'n*, 149 Mo. App. 493, 130 S. W. 1124, the dues of a member of a fraternal insurance order were taken care of by the local lodge for a time. In June the secretary of the lodge requested payment for May or June, or at least for June. The member paid the June dues, with the understanding that he would pay future dues promptly, and liquidate back dues which the local lodge had been carrying as rapidly as he could. In June he was afterwards suspended. It was held that his suspension was invalid.

In *Coughlin v. Knights of Columbus*, 64 Atl. 223, 79 Conn. 218, the laws of a fraternal benefit society provided for a monthly assessment against each subordinate council on the number of its members as reported monthly, payable immediately after the 1st day of the month, and provided that each member of a council should pay his regular monthly assessments within 30 days from the 1st day of each month under penalty of ipso facto suspension for failure to so pay. It was held that the payment by the treasurer of a subordinate council of the monthly assessment immediately after the 1st day of each month was not a payment by any member of the council of his individual monthly assessment.

In *Schoeller v. Grand Lodge A. O. U. W.*, 110 App. Div. 456, 96 N. Y. Supp. 1088, the facts were these: A financier of a local lodge to accommodate members, received assessments at his home, and on the night of the last day fixed for payment of an assessment a son of a member called at the financier's home to make payment, but was unable to do so because no one was there. Though it was customary for the financier to receive assessments for a few days after the last day for payment, no other tender was made; and failure to pay an assessment on or before the last day fixed under the

laws of the order terminated membership ipso facto. It was held that the member was suspended for failure to pay the assessment.

In *Griffith v. Merchants' Life Ass'n of Burlington*, 141 Iowa, 414, 119 N. W. 694, 133 Am. St. Rep. 177, defendant insurance society appointed a bank as its depository and collecting agent, directing the bank to stamp the members' call "paid," and mail the addressed postal card to defendant; that, unless specially authorized, the bank should not receive any money after the month in which the call was payable. Decedent, a member of the association and a depositor at the bank, paid his assessments there quarterly, and on one occasion stated to the cashier, that, if decedent should ever forget to pay his assessments, the cashier should pay it for him and charge the amount to decedent's account, to which the cashier agreed. The assessment due on decedent's policy prior to April 30, 1907, was not paid until his death on May 14th following, though at all times decedent had had a greater balance in the bank than was necessary to pay such assessment. It was held that the agreement between decedent and the cashier did not constitute payment of the assessment, and the policy had lapsed.

Suspension of a member of a mutual benefit insurance company for nonpayment of dues after a tender in good faith, when due, was unauthorized. *Royal Circle of Friends of the World v. Paine*, 103 Ark. 171, 146 S. W. 142; *Laue v. Grand Fraternity*, 132 Tenn. 235, 177 S. W. 941, L. R. A. 1915F, 1056, Ann. Cas. 1917A, 376.

A provision of the by-laws of a fraternal benefit association, declaring a forfeiture ipso facto for nonpayment of assessments, is not enforceable as against a member whose assessments had been paid, although not regularly shown on the association's books (*Moran v. Knights of Columbus*, 46 Utah, 397, 151 Pac. 353). And a clause in a policy forfeiting sick benefits for arrearage in payment of dues does not prevent recovery by a member who had been in arrears, but had made payments from time to time and had paid up all back dues before he became sick (*Union Cent. Relief Ass'n v. Johnson* [Ala.] 73 South. 816).

2371-2373. (m) Payment or tender to officers or agents

2371 (m). In *Supreme Hive of Ladies of Maccabees of the World v. Owens* (Tex. Civ. App.) 167 S. W. 233, it was held that where a member at large of a fraternal order paid dues and assessments to a third person, who remitted them to the supreme officers, who received them without objections, and the officers did not in-

struct the member not to make payments to such person, and the member continued to do so until her death, and such person did not remit them all, a recovery on the certificate could not be defeated on the ground that dues and assessments had not been paid. So in *National Ben. Ass'n v. Elzie*, 35 App. D. C. 294, it was held that the question of whether the collector of an insurance association, in giving unconditional receipts for payments made by a beneficiary in arrears, acted beyond the scope of his authority, does not arise where the association accepted the payments, presumably with knowledge of all the facts attending the collections and the execution of the receipts. Moreover, a stipulation in a mutual benefit insurance policy that the local secretary should be the agent of insured in the remittance of past due premiums is invalid, as creating inconsistent duties (*United States Benev. Soc. v. Watson*, 84 N. E. 29, 41 Ind. App. 452). And a provision in a by-law of a fraternal order, which was made a part of a policy, does not charge an insured with notice that a clerk in the office of a local agent did not have authority to receive monthly assessments, or that the local agent did not have authority to delegate such power to the clerk (*Supreme Lodge K. P. v. Connelly*, 185 Ala. 301, 64 South. 362).

An officer of a subordinate lodge of a mutual benefit association who is authorized to receive and receipt for payments of monthly dues may receipt therefor at the time of payment or at any time thereafter. *United Moderns v. Pistole*, 86 S. W. 377, 38 Tex. Civ. App. 422.

Where the secretary of a fraternal benefit association, without the knowledge of the assured, reimbursed himself out of funds sent to pay dues, for dues previously advanced by him, the cancellation of the benefit certificate for nonpayment of dues was void (*Cunningham v. Modern Brotherhood of America*, 148 N. W. 918, 96 Neb. 827). If it is the custom of the collecting agent of a fraternal benefit association to receive by mail remittances from its members at a certain post office, and the official stationery designates that post office as his address, an assessment addressed to such agent, reaching such post office on the day it became due, is a payment of said assessment, though the money was not delivered until later to the agent, who unknown to the insured or his beneficiary had changed his place of receiving mail from the designated post office to a rural delivery route (*Vancura v. Zapadni Cesko Bratrská Zednota*, 78 Neb. 755, 111 N. W. 845). So in *Supreme Lodge of the Pathfinder v. Johnson*, 47 Tex. Civ. App. 109, 104 S. W. 508, it was

held that the fact that on December 23, 1905, a draft to cover dues and an assessment payable before the end of the month was mailed in Louisiana to one in Texas, who had been a local collector for a fraternal order, but who had resigned December 12th, was not payment to the order, and, neither the order nor its collector having received payment, the member was properly suspended, where under the constitution and laws of the order failure to make payment before the last day of the month operated as a suspension of the member without notice.

2373-2375. (n) Same—Subordinate lodge or officer thereof as agent of supreme body

2373 (n). The scribe of a local court of a fraternal insurance society, required to collect money due to the society from the members of the court, and to remit the same to the society is the agent of the society, and not the agent of the members of the local court, though he is elected by the local court and though the articles of the society declare that the scribe shall be the agent of the members of the local court.

Mosaic Templars of America v. Jones, 99 Ark. 204, 137 S. W. 812;
Davidson v. Temple of Supreme Tribe of Ben Hur, 135 Iowa, 88,
111 N. W. 46.

Where by the constitution and by-laws of a benefit association the members are to pay their assessment to the secretary of the local lodge to which they belong, in receiving such dues he acts as the agent of the grand lodge of the order which issues the certificate.

Soehner v. Grand Lodge of Order of Sons of Herman, 104 N. W. 871,
74 Neb. 399; *Schuster v. Knights and Ladies of Security*, 60 Wash.
42, 110 Pac. 680, 140 Am. St. Rep. 905; *Nies v. Protected Home
Circle (Sup.)* 166 N. Y. Supp. 426; *Riess v. Supreme Conclave, Im-
proved Order of Heptasophs*, 177 App. Div. 845, 164 N. Y. Supp. 878.

In *Grand Camp Colored Woodmen, Forest of Arkansas, v. Ware*, 107 Ark. 102, 153 S. W. 1114, it was held that where a member of a fraternal order paid all dues to the secretary of the lodge empowered to collect dues, but the secretary failed to make remittance of the dues, and the lodge in consequence was suspended, the certificate was not forfeited.

Where the officer of a local lodge of a mutual benefit association, to whom the assessments are payable, pays an assessment for one of the members, neither he nor a later incumbent of the office can

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divert money paid by the member upon a subsequent assessment to reimburse the amount so advanced.

Mosiman v. Occidental Mut. Ben. Ass'n, 109 Pac. 413, 82 Kan. 670;
Bochdam v. Supreme Lodge, K. P., 123 N. Y. Supp. 59, 67 Misc.
Rep. 407.

2375-2377. (o) Application of funds to payment

2375 (o). Where a member of a fraternal insurance society has paid an advance assessment prior to his initiation, he cannot be held to be in arrears until such advance payment has been duly applied on some assessment.

Walt v. Mystic Workers of the World, 140 Iowa, 648, 119 N. W. 72;
Trotter v. Grand Lodge of Iowa Legion of Honor, 132 Iowa, 513,
109 N. W. 1099, 7 L. R. A. (N. S.) 569, 11 Ann. Cas. 533; *Knights of
the Modern Maccabees v. Mayfield* (Tex. Civ. App.) 147 S. W. 675;
Rambousek v. Supreme Council of Mystic Tollers, 106 N. W. 947,
133 Iowa, 375; *Sleight v. Supreme Council of Mystic Tollers*, 107
N. W. 183, 133 Iowa, 379; *Price v. Brotherhood of Railroad Train-
men*, 116 Minn. 275, 133 N. W. 798.

Where the society was indebted to plaintiff for sick benefits due, the policy could not then be forfeited for nonpayment of dues or assessments.

*National Council Junior Order United American Mechanics of the
United States v. Thomas*, 163 Ky. 364, 173 S. W. 813; *Royal Frater-
nal Union v. Stahl* (Tex. Civ. App.) 126 S. W. 920.

In *Burchard v. Western Commercial Travelers' Ass'n*, 123 S. W. 973, 139 Mo. App. 606, it was held that when a member in a beneficial association, on receiving notice of an assessment, remitted for it, the secretary of the association could not apply the remittance to payment of a prior assessment, so as to justify a forfeiture for nonpayment of the assessment of which notice was given; no notice being given the member that the prior assessment was unpaid.

In *Ibs v. Hartford Life Ins. Co.*, 137 N. W. 289, 119 Minn. 113, it was held that if the company has under its control money of insured which its policy provides shall be applied on dues and assessments, before the company can forfeit for nonpayment of dues, it must apply such payments.

Payments of money improperly exacted from a member of a mutual benefit insurance association should be treated as a credit on future assessments so as to prevent forfeiture for nonpayment.

Clark v. Iowa State Travelling Men's Ass'n, 156 Iowa, 201, 135 N. W. 1114, 42 L. R. A. (N. S.) 631; *Supreme Council Catholice Knights of
America v. Fenwick*, 183 S. W. 906, 169 Ky. 269.

In *Johanson v. Grand Lodge A. O. U. W. of Utah, Wyoming and Idaho*, 86 Pac. 494, 31 Utah, 45, insured, while a member of defendant mutual benefit society, on becoming impecunious and in ill health, applied to it for relief and was notified by his subordinate lodge that it would make a loan to him for four months' assessments, or for January, February, March, and April, 1904; that such application would carry his dues and assessments for four months, or until May 1st, and that at the expiration of that time he would have to make a further application to the lodge; that he was in good standing on the books of the Grand Lodge. It was held that, the subordinate lodge then having money on hand applicable to the purpose, such loan constituted an appropriation of so much of the funds of the subordinate lodge as was necessary to pay such assessments.

In *McCann v. Supreme Conclave, Improved Order Heptasophs*, 87 Atl. 383, 119 Md. 655, 46 L. R. A. (N. S.) 537, however, it was held that, under the by-laws of a fraternal insurance association providing that the supreme conclave was not responsible for sick benefit regulations adopted by subordinate conclaves, the fact that a subordinate conclave owed insured for sick benefits a greater sum than that due on his monthly assessment will not defeat the right of the general order to set up nonpayment as a defense.

In *Head Camp, Pacific Jurisdiction, Woodmen of the World, v. Woods*, 81 Pac. 261, 34 Colo. 1, it was held that where, under the laws of a beneficial association, members engaged in certain hazardous occupations were required to pay an extra premium, and a regular assessment, without addition for a hazardous occupation in which the member was engaged, was paid in the early part of a month to apply on an assessment not delinquent until the close of the month, the association was under no obligation to apply such payment to a payment of the additional charge because of the hazardous occupation.

In *Hetzel v. Knights and Ladies of Golden Precept*, 106 N. W. 157, 129 Iowa, 655, a resolution by a mutual benefit society provided that all new members should pay one advance mortuary assessment at the time of joining the order, and the by-laws declared that funds to pay death losses should be raised by equal contribution from "members." It was held that an advance assessment paid by a member on his joining the order was not applicable to a mortuary assessment levied prior to the date he became a member.

That a mutual benefit company owed insured money for services when an assessment was due would not authorize its application to the

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payment of an assessment on insured's certificate, or constitute a payment of such assessment, unless the company was directed or requested so to do. *Caywood v. Supreme Lodge of Knights & Ladies of Honor*, 171 Ind. 410, 86 N. E. 482, 23 L. R. A. (N. S.) 304, 131 Am. St. Rep. 253, 17 Ann. Cas. 503.

In several cases articles of incorporation of a mutual assessment insurance company, together with its by-laws and other writings entering into the contract of insurance were construed, and it was held that thereunder neither the guaranty deposit made by a member when he was admitted nor any part of the association's guaranty fund could be applied in payment of delinquent assessments.

Bond v. Bankers' Life Ass'n of Des Moines, Iowa, 133 Pac. 854, 90 Kan. 215; *Stubbs v. Bankers' Life Ass'n*, 55 Ind. App. 579, 101 N. E. 638; *Hoover v. Bankers' Life Ass'n*, 155 Iowa, 322, 136 N. W. 117.

2378-2380. (p) Excuses for nonpayment

2378 (p). A member unlawfully suspended is excused from making a tender of subsequent dues, so long as the insurer refuses to reinstate him and insists that his rights have been forfeited.

Clow v. Western Life Indemnity Co., 182 Ill. App. 251; *Marcus v. National Council of Knights and Ladies of Security*, 127 Minn. 196, 149 N. W. 197; *Supreme Lodge K. P. v. Connelly*, 185 Ala. 301, 64 South. 362; *Kulberg v. National Council, Knights and Ladies of Security*, 145 N. W. 120, 124 Minn. 437; *Bochdam v. Supreme Lodge K. P.*, 123 N. Y. Supp. 59, 67 Misc. Rep. 407; *Barrett v. Grand Lodge A. O. U. W. of State of New York*, 117 N. Y. Supp. 125, 63 Misc. Rep. 429; *Raymond v. Supreme Lodge, Knights of Pythias of the World*, 148 N. Y. Supp. 76, 85 Misc. Rep. 141, judgment affirmed, 165 App. Div. 944, 149 N. Y. Supp. 1108; *Southern Life Ins. Co. v. Logan*, 9 Ga. App. 503, 71 S. E. 742; *Hazel v. Golden Eagle Ass'n*, 161 N. Y. Supp. 91, 96 Misc. Rep. 703.

Where it was clear that a tender of the legal dues would have been refused by the insurer unless accompanied by the amount of an illegal assessment, it was not necessary that insured tender such dues in order to prevent a forfeiture of his policy.

Ibs v. Hartford Life Ins. Co., 121 Minn. 310, 141 N. W. 289, Ann. Cas. 1914C, 798; *King v. Hartford Life & Annuity Ins. Co.*, 114 S. W. 63, 133 Mo. App. 612; *Robinson v. Mutual Reserve Life Ins. Co. (C. C.)* 182 Fed. 850; *Hicks v. Northwestern Aid Ass'n*, 117 Tenn. 203, 96 S. W. 962; *Wayland v. Western Life Indemnity Co.*, 166 Mo. App. 221, 148 S. W. 626; *Johnson v. Hartford Life Ins. Co.*, 166 Mo. App. 261, 148 S. W. 631; *Hicks v. Northwestern Aid Ass'n*, 117 Tenn. 203, 96 S. W. 962.

Contra is *Goldberger v. United States Grand Lodge, Order Brith Abraham*, 136 N. Y. Supp. 13, 77 Misc. Rep. 136, in which it was held that where a fraternal insurance order assesses illegal dues against a member, and includes them with the legal quarterly assessment, the member, to preserve his rights, is bound to tender the amount lawfully due. See *Reiter v. National Council of Knights and Ladies of Security*, 154 N. W. 665, 131 Minn. 82; *Gibson v. Iowa Legion of Honor (Iowa)* 159 N. W. 639; *Wagner v. Supreme Lodge, K. P. (Ind. App.)* 116 N. E. 91.

Where the default caused by lack of notice was due to the negligence of the officer, the company could not avail itself thereof to evade payment under the certificate.

Judge v. Masonic Mut. Ben. Ass'n, 30 Ohio Cir. Ct. R. 138; *Dague v. Grand Lodge Brotherhood of Railroad Trainmen*, 73 Atl. 735, 111 Md. 95.

In *Hotchkiss v. Supreme Lodge K. P.*, 178 Mo. App. 137, 165 S. W. 1120, it was held that the omission of the local lodge to send to the Supreme Lodge an agreement by it to pay the dues of the member, as required by the by-laws authorizing such agreement, does not defeat the beneficiary's rights under the certificate.

Where rules provided that nonpayment of assessment would cause a forfeiture of membership, the beneficiaries of the death certificate of a member who had defaulted could not recover thereon, though the assessments would have been paid by a beneficiary but for the belief that the insured died long prior to the time of his actual death (*Mooney v. Supreme Council of Royal Arcanum*, 90 Atl. 132, 243 Pa. 463). So, where the rules of a mutual benefit society did not require its secretary to go to the homes of members to collect assessments, his previous custom, of which the Supreme Lodge had no notice, in so doing was a mere courtesy, on which no rights could be based (*Fletcher v. Supreme Lodge Knights and Ladies of Honor [Tex. Civ. App.]* 135 S. W. 201). Similarly, a statement of the secretary of a fraternal beneficial society, made to a son of a member, that the dues of the member for designated months had been paid, which statement was true, did not justify a failure to pay the dues for subsequent months (*Houle v. Société St. Jean Baptiste*, 116 N. W. 1076, 153 Mich. 357). So, notice by benefit society to local lodge that it and its members would be suspended unless it should be recruited with younger members, though unauthorized, did not justify member in failing to pay dues up to the date specified, so as to authorize a recovery on his certificate, notwithstanding his nonpayment (*Makman v. Independent Order Free*

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Sons of Judah, 148 N. Y. Supp. 141, 86 Misc. Rep. 13). Likewise, where an officer of defendant insurance order stated that insured was not a fit person to belong to the order, and that if compelled he would institute proceedings for expulsion, but that the best way was to let the insured lapse out, and the beneficiary's agent, who was to pay the installment, stated that he would submit the matter to her, and she made no further offer to pay, the defense of nonpayment is available; there being no refusal to receive dues (*McCann v. Supreme Conclave, Improved Order Heptasophs*, 87 Atl. 383, 119 Md. 655, 46 L. R. A. [N. S.] 537).

In *Sovereign Camp Woodmen of the World v. Wagon* (Tex. Civ. App.) 164 S. W. 1082, it was held that under Rev. St. 1911, art. 4847, prohibiting waiver of the constitution or laws of a fraternal beneficiary association by a subordinate body, an agreement by the clerk not authorized by the by-laws to pay the assessments of a member is no defense to his suspension.

In *Kray v. Mutual Reserve Life Ins. Co.*, 50 Tex. Civ. App. 555, 111 S. W. 421, it was held that, where the directors of an insurance association were authorized by its by-laws to levy extra assessments at such dates and in such sums as its executive committee might deem necessary, plaintiff's failure to pay an extra assessment so levied, because he believed the same was unauthorized, after notice that, if he did not pay it, the policy would be forfeited, did not excuse his subsequent failure, without complaint or demand for explanation from the insurer, to pay a subsequent regular bimonthly assessment for the nonpayment of which the policy was forfeited.

2380-2382. (q) Same—Sickness and insanity

2380 (q). The sickness or insanity of a member of a mutual benefit insurance association is no excuse for his nonpayment of dues and assessments pursuant to the terms of his contract.

Schelber v. Protected Home Circle, 146 Ill. App. 574; *McCann v. Supreme Conclave, Improved Order of Heptasophs*, 87 Atl. 383, 119 Md. 655, 46 L. R. A. (N. S.) 537; *Sheridan v. Modern Woodmen of America*, 44 Wash. 230, 87 Pac. 127, 7 L. R. A. (N. S.) 973, 120 Am. St. Rep. 987; *Brotherhood of Ry. Trainmen v. Dee*, 101 Tex. 597, 111 S. W. 396, reversing (Tex. Civ. App.) 108 S. W. 492; *Independent Order of Sons and Daughters of Jacob of America v. Enoch*, 108 Miss. 302, 66 South. 744.

In *Meisenbach v. Supreme Tent, Knights of the Maccabees of the World*, 140 Mo. App. 76, 119 S. W. 514, the illness of a member of a mutual benefit association is no ground for refusing to ac-

cept his dues or for suspending him from membership, in the absence of false statements in his application.

In *Independent Order of Sons and Daughters of Jacob of America v. Enoch*, 108 Miss. 302, 66 South. 744, membership of deceased in a fraternal insurance order was held forfeited for nonpayment of dues, notwithstanding her applications for sick benefits, which were refused by the lodge.

A custom on the part of local lodges of mutual benefit societies to advance dues of sick members to prevent their expulsion for failure to pay dues was at most but a courtesy, which could not estop the association from enforcing a forfeiture of a member's certificate for nonpayment of dues (*Brotherhood of Ry. Trainmen v. Dee*, 101 Tex. 597, 111 S. W. 396, reversing [Tex. Civ. App.] 108 S. W. 492). Further, in the last-mentioned case a rule provided that, if a brother in good standing becomes sick or disabled, he shall immediately notify the financier of his lodge in writing, and on receipt of such notice by the financier before the 1st day of the month the brother's dues shall be paid by his lodge for such period as the lodge shall determine; but such written notice shall be a condition precedent to the brother's rights under the section. It was held that, in the absence of such notice, the lodge was under no obligation to pay the dues of insured while ill, and that his failure to do so was insufficient to excuse a forfeiture for nonpayment of dues.

In *Sovereign Camp Woodmen of the World v. Wagnon* (Tex. Civ. App.) 164 S. W. 1082, it was held that where the by-laws of a mutual benefit association required it to pay the dues of a member, who was insane and financially unable to pay his dues, but provided that such payments should not be made if the member was in arrears more than three months, the association was not required to pay the dues where no proof of the insanity of a member was offered until six months after his suspension for nonpayment and more than three months after his death.

2382-2386. (r) Proceedings to give effect to forfeiture

2382 (r). A proceeding for the suspension of a member because of a default in the payment of dues or assessments must be made in strict compliance with the provisions for such suspension, in order to be effective.

Brooks v. Conservative Life Ins. Co., 106 N. W. 913, 132 Iowa, 377, 119 Am. St. Rep. 560, 11 Ann. Cas. 339; *Wajczellunas v. St. Peter's Lithuanian Society*, 126 N. Y. Supp. 884, 141 App. Div. 852; *Bange v. Supreme Council Legion of Honor of Missouri*, 153 Mo. App. 154,

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132 S. W. 276; Grand Court of Texas Independent Order of Calanthe v. Johns (Tex. Civ. App.) 181 S. W. 869; Raab v. National Slavonic Society of United States of America, 156 N. Y. Supp. 301, 98 Misc. Rep. 87; Laue v. Grand Fraternity, 132 Tenn. 235, 177 S. W. 941, L. R. A. 1915F, 1056, Ann. Cas. 1917A, 376; Lyons v. Grand Lodge of K. P. of North Carolina, 172 N. C. 408, 90 S. E. 423.

Under appropriate provisions of the by-laws, however, no affirmative action or notice to assured of forfeiture on part of association is necessary to forfeit the certificate.

Young v. Aeolian Council No. 17, 59 Pa. Super. Ct. 174; Cole v. Knights of Maccabees of the World (Tex. Civ. App.) 188 S. W. 699.

By-laws of a fraternal insurance order, suspending members upon local officers' failure to remit assessments, but providing no notice of forfeiture, are void (Riess v. Supreme Conclave, Improved Order of Heptasophs, 177 App. Div. 845, 164 N. Y. Supp. 878).

In Burchard v. Western Commercial Travelers' Ass'n, 123 S. W. 973, 139 Mo. App. 606, it was held that where the duty of suspending members of a beneficial association was placed in the directors they could not delegate such duty to the secretary.

Where it is a custom of an order to give a suspended member notice of his suspension, such notice is necessary to work a forfeiture of the certificate (Bange v. Supreme Council Legion of Honor of Missouri, 105 S. W. 1092, 128 Mo. App. 461).

In Homann v. Allgemeiner Arbeiter Bund of Michigan, 184 Mich. 417, 151 N. W. 559, facts as to delay in payment of assessments and acceptance thereof were held to show that neither member of benefit society nor officers of local society regarded its laws as to suspension and expulsion as self-executing.

In Walton v. Fraternal Aid Ass'n, 149 Mo. App. 493, 130 S. W. 1124, a notice by the general secretary of a fraternal insurance order addressed to a member of a local lodge, stating that the notice is to remind the member that the reports from the local lodge show him to be in arrears, that it is to advise him of the importance of being prompt in the payment of assessments, and that by suspension he is the loser, etc., is not a notice of forfeiture of the certificate for nonpayment of dues.

In Meisenbach v. Supreme Tent, Knights of the Maccabees of the World, 140 Mo. App. 76, 119 S. W. 514, it was held that, if a member of a mutual benefit association is suspended for default in payment of dues, he would be aware of the fact and presumed to know that the by-laws worked a suspension of his membership, and

it would be incumbent on him to seek reinstatement according to the by-laws, though no notice of suspension was sent him; but if he tendered an assessment, and it was wrongfully refused, it would not be presumed that he knew that he was suspended, since such a result would be by declaration of the officers of the order without cause, and he could not be regarded as having acquiesced in suspension and abandoned his membership until he had notice of his suspension.

2386-2387. (s) Effect of suspension

2386 (s). On forfeiture of a benefit certificate for default in payment of an assessment and suspension of members, beneficiaries cannot recover where the member dies during such suspension.

Supreme Lodge, Knights and Ladies of Honor v. Johnson, 81 Ark. 512, 99 S. W. 834; Tabor v. Modern Woodmen of America (Tex. Civ. App.) 163 S. W. 324.

A member, having to his knowledge been dropped, and having taken no steps for reinstatement, and not having tendered subsequent dues, acquiesced in his dropping, and was not, when killed two months later, a member in good standing, within his benefit certificate (Roberts v. Brotherhood of Locomotive Firemen and Enginemen, 160 S. W. 924, 156 Ky. 189).

Where a member acquiesced in a suspension, his beneficiary is bound by such acquiescence, even though the suspension was not legal (Bange v. Supreme Council Legion of Honor of Missouri, 179 Mo. App. 21, 161 S. W. 652).

2387-2391. (t) Dissolution or suspension of subordinate lodge

2387 (t). In Royal Circle of Friends of the World v. Paine, 146 S. W. 142, 103 Ark. 171, it was held that a suspension of a subordinate lodge of a mutual benefit association for nonpayment of an assessment after a tender, when due, was unauthorized, and would not preclude recovery of amount of certificate of deceased member in good standing.

In District Grand Lodge No. 23, United Order of Odd Fellows in America, v. Hill, 3 Ala. App. 483, 57 South. 147, it was held that, though the constitution of a beneficial life insurance association provides that a member of a lodge which is not in good financial standing with the order on account of nonpayment of dues is, during such period of disability, not insured, the association must furnish reasonable security to its members against the negligence and inefficiency of the officers under whose control its affairs are placed,

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and the provision cannot be asserted as a defense unless made out with literal exactness.

2391-2393. (u) Waiver by and estoppel of insured

2391 (u). By remaining silent after notification of a void expulsion or suspension from a mutual benefit association, a member forfeits his rights in the society, including his insurance.

Bange v. Supreme Council Legion of Honor of Missouri, 105 S. W. 1092, 128 Mo. App. 481; *Lavin v. Grand Lodge A. O. U. W. of Missouri*, 86 S. W. 600, 112 Mo. App. 1; *Supreme Lodge Knights of Honor v. Hahn*, 43 Ind. App. 75, 84 N. E. 837; *Easter v. Brotherhood of American Yeomen*, 157 S. W. 992, 172 Mo. App. 292; *Sheridan v. Modern Woodmen of America*, 44 Wash. 230, 87 Pac. 127, 7 L. R. A. (N. S.) 973, 120 Am. St. Rep. 987; *Pfingston v. Grand Lodge Ancient Order of United Workmen of Indiana*, 41 Ind. App. 9, 83 N. E. 254.

An opposite result was reached in *Dague v. Grand Lodge Brotherhood of Railroad Trainmen*, 73 Atl. 735, 111 Md. 95. Plaintiff sent his dues by mail to the C. lodge, of which he had been a member, but they were not received because of the absence of the local officer. In the preceding month plaintiff, without his knowledge or consent, had been transferred to the M. lodge. The C. lodge refused his dues because of his alleged delinquency, and the M. lodge refused them because it had not accepted the transfer. The officer of the C. lodge told him that a mistake had been made in suspending him, and that he thought the lodge would readmit him, and he filled out and returned a blank given him for readmission. He was notified to attend the C. lodge on a certain date, but the reason therefor was not stated, and his work carried him to a distant city on the date mentioned. Afterwards he attempted to join another lodge, but was rejected for physical disqualification, and he wrote a letter requesting that the dues which had been received after his expulsion be refunded. It was held that, as plaintiff did not know what his rights were, and was pursuing such course as he was advised was proper for the restoration of his rights, he had not waived the illegality of his expulsion.

A member of a benefit insurance society who had not been lawfully suspended at the time of an accident is not estopped to rely on that fact by an application for reinstatement.

Colle v. Order of United Commercial Travelers of America, 161 N. C. 104, 76 S. E. 622; *Zahn v. Royal Fraternal Union of St. Louis*, 154 Mo. App. 70, 133 S. W. 374; *McNaughton v. Des Moines Life Ins. Co.*, 122 N. W. 764, 140 Wis. 214.

5. RIGHTS OF INSURED AFTER FORFEITURE FOR NONPAYMENT OF PREMIUMS OR ASSESSMENTS**2393-2395. (a) Rights in general**

2393 (a). On the alleged termination of a policy by insurer, insured in general may tender the premiums when due, wait till the policy matures, and then sue for the benefits, or when notified that the insurer has elected to forfeit the policy, may acquiesce and sue for damages, or he may institute proceedings to have the issue as to whether or not the policy has been in fact forfeited, or is still in force, judicially determined (*Royal Fraternal Union v. Lunday*, 51 Tex. Civ. App. 637, 113 S. W. 185).

Provisions of a policy relating peculiarly to the continuation of the risk are inapplicable and immaterial where the policy has been converted into a death claim by the death of insured.

State Mut. Life Ins. Co. v. Forrest, 19 Ga. App. 296, 91 S. E. 428; *Veal v. Security Mut. Life Ins. Co.*, 65 S. E. 714, 6 Ga. App. 721.

In *McGillon v. United Brotherhood of Carpenters & Joiners of America*, 77 N. H. 590, 89 Atl. 301, under the by-laws of an insurance association, a member who failed to pay his dues from January 1st until the middle of April, it was held, at the time of the payment, to be owing three months' dues, so that no recovery could be had where he died in less than three months thereafter.

A provision in a loan agreement that upon default in premiums on policy pledged the loan if unpaid may be foreclosed by satisfying the indebtedness, the balance if any to be applied to purchase extended insurance, is a reasonable means of settlement and not contrary to public policy (*McCall v. International Life Ins. Co.*, 196 Mo. App. 318, 193 S. W. 860).

In *Shumaker v. Security Life & Annuity Co. of America* (C. C.) 153 Fed. 332, however, it was held that under the provisions of the policy, where the insured obtained the 30 per cent. advance on the payment of each premium, on his subsequent default he was not entitled to the benefit of the automatic nonforfeiture provision.

In *Southern Life Ins. Co. v. Hazard*, 146 S. W. 1107, 148 Ky. 465, where a life policy provided that premiums would be paid by the company if insured should become wholly disabled after payment of one premium on the insured's furnishing satisfactory proof of disability, and provided for a grace of 31 days during which the

contract might remain in force, and insured became disabled several months before the next annual premium, but failed to notify the company until seven weeks after the expiration of the extension period, it was held, that the notice was sufficient and the company bound.

In *Mutual Ben. Life Ins. Co. v. Commissioner of Ins.*, 115 N. W. 707, 151 Mich. 610, the statute (Pub. Acts 1907, p. 253, No. 187, § 1, subd. 8) provided that a policy of life insurance shall contain a provision which, in event of "default in premium payments" after premiums shall have been paid for three years, shall secure to the owner of the policy a stipulated form of insurance, the net value of which shall be at least equal to the reserve at the date of "default" on the policy, and on any dividend additions thereto, less a sum not exceeding $2\frac{1}{2}$ per cent. of the amount insured by the policy, and of any existing dividend additions thereto, and less any existing indebtedness to the company on the policy, and that such provision shall stipulate that the policy may be surrendered to the company within one month from the date of "default" for a specified cash value at least equal to the sum which would otherwise be available for the purpose of the insurance, and may stipulate that the company may defer payments for not more than six months after the application therefor is made. It was held that the statute does not apply to, nor prohibit, an automatic premium loan provision in a policy providing that, if requested by insured prior to the expiration of a month of grace after the due day allowed by the policy for payment of premiums the arrears will be charged as an indebtedness against the policy, bearing interest at a rate not exceeding 6 per cent. per annum, provided the entire indebtedness then outstanding shall be within the limits secured by the cash surrender value, since, where the premium is paid by operation of the automatic loan provision, there is no "default in premium payments," within the meaning of the statute, but rather an election by the policy holder not to make default.

Insurer has been held bound to notify insured that it elected to treat, after default, premium note as indebtedness against the policy which would reduce the term insurance purchased with the surrender value (*Missouri State Life Ins. Co. v. Crabtree*, 124 Ark. 214, 187 S. W. 173).

2395-2398. (b) Reinstatement

2395 (b). A forfeited contract cannot be reinstated after the member's death.

Brown v. Knights of the Protected Ark, 43 Colo. 289, 96 Pac. 450; *Tabor v. Modern Woodmen of America* (Tex. Civ. App.) 163 S. W. 324; *Bennett v. Sovereign Camp, Woodmen of the World* (Tex. Civ. App.) 168 S. W. 1023; *Gillis v. Dabney* (Sup.) 150 N. Y. Supp. 453; *Supreme Commandery, United Order of the Golden Cross of the World, v. Bernard*, 26 App. D. C. 169, 6 Ann. Cas. 694; *Meerbach v. Metropolitan Life Ins. Co.*, 46 Pa. Super. Ct. 133; *Grand Lodge A. O. U. W. v. Taylor*, 99 Pac. 570, 44 Colo. 373; *Butler v. Grand Lodge A. O. U. W.*, 79 Pac. 861, 146 Cal. 172; *Gifford v. Workmen's Ben. Ass'n*, 72 Atl. 680, 105 Me. 17, 17 Ann. Cas. 1173; *Havlicek v. Western Bohemian Fraternal Ass'n* (Minn.) 163 N. W. 985.

In *Prudential Ins. Co. of America v. Union Trust Co.*, 56 Ind. App. 418, 105 N. E. 505, however, under a policy, providing that in case of lapse it could be revived on payment of all arrears and proof of insured's insurability satisfactory to the company, it was held that the company could not refuse to revive the policy and defeat its liability merely because insured died as the result of an accident before the application and proofs of insurability reached its home office. So it has been held that it is a contractual right of a member of a mutual benefit association to reinstatement on compliance with the laws of the order as to reinstatements (*Grand Lodge of Brotherhood of Railroad Trainmen v. Kennedy* [Tex. Civ. App.] 188 S. W. 447). And where life insurance policy lapsed for nonpayment of premiums and interest on a loan secured thereby, the insurer was within its rights in refusing to make a second loan and reinstating policy, where there was no excess cash value over the amount then due (*McLeod v. Travelers' Ins. Co.* [Ga. App.] 92 S. E. 1014).

In action on life policy, judgment was properly rendered for defendant, insured having defaulted in payment of premiums and not having exercised his option to take advantage of any of alternative provisions in policy (*Fountain v. Security Mut. Life Ins. Co.* [Ga. App.] 93 S. E. 118).

The mere failure to assert rights provided for in the event of nonpayment of premiums does not constitute an abandonment thereof. No duty devolves upon the insured to protect such rights until

some notice by the company is served upon such insured calling for action.

Provident Sav. Life Ins. Co. v. Schoolfield, 97 S. W. 345, 29 Ky. Law Rep. 1230; *Ingersoll v. Mutual Life Ins. Co. of New York*, 156 Ill. App. 568; *Alken v. Atlantic Life Ins. Co.*, 173 N. C. 400, 92 S. E. 184.

In *New York Life Ins. Co. v. Hardison*, 85 N. E. 410, 199 Mass. 190, 127 Am. St. Rep. 478, it was held that a policy authorizing reinstatement on payment of all arrears, with interest thereon, not to exceed 6 per cent. per annum, was a substantial compliance with St. Mass. 1907, p. 895, c. 576, § 75, requiring a provision for reinstatement on payment of all overdue premiums and any other indebtedness to the company on the policy, with interest at a rate not exceeding 6 per cent. per annum.

The provision for grace, secured to the insured by Acts Tenn. 1907, c. 457, § 2, providing that no policy of life insurance shall be issued unless containing a provision for a grace of one month for the payment of every premium after the first year, became a part of the policy itself upon reinstatement, subsequent to the taking effect of the act, after lapsing for failure to pay premiums (*Edington v. Michigan Mut. Life Ins. Co.*, 183 S. W. 728, 134 Tenn. 188).

So far as a deceased member's reinstatement in a beneficiary association was a result of the default or neglect of the local record keeper, such keeper was the association's and not the member's representative, and the association cannot escape liability on a life certificate because of such default or neglect (*Lounsbury v. Knights of the Maccabees of the World*, 112 N. Y. Supp. 921, 128 App. Div. 394, affirmed 93 N. E. 377, 199 N. Y. 573).

An article of a fraternal insurance order stipulating that no person shall be admitted to membership unless he is under the age of 45 at the time of receiving a degree relates solely to qualifications of persons for original admission to the order, and does not apply to one admitted to a lodge of the order as one previously suspended from the order, but other articles relating to readmission of suspended members then control (*McRaith v. Grand Lodge, A. O. U. W.*, 149 Iowa, 148, 126 N. W. 321).

Under a by-law of a mutual benefit association, providing that any member failing to pay an assessment within 30 days after notice mailed to him shall be dropped from the association and shall be required to pay a new membership fee in order to renew his insurance, where a member was in failing health at the time he failed

to pay an assessment, and so continued till his death, the beneficiary was not entitled to pay back assessments and have the policy reinstated three months after the delinquent assessment became due (*Hay v. People's Mut. Benev. Ass'n of North Carolina*, 55 S. E. 623, 143 N. C. 256). In *Schuster v. Knights and Ladies of Security*, 60 Wash. 42, 110 Pac. 680, 140 Am. St. Rep. 905, it was held that a beneficial association by-law which provides that the receipt of dues or assessments from a suspended member not in good health shall not reinstate his life certificate is invalid as to payments retained by the association.

After a policy has lapsed by its terms for nonpayment of premium, the beneficiary is bound by the act of insured in executing a note containing a new forfeiture condition to obtain a reinstatement (*Wichita Southern Life Ins. Co. v. Roberts* [Tex. Civ. App.] 186 S. W. 411). But statements in formal application by member of benefit society for reinstatement not required as condition precedent to reinstatement are not binding on beneficiary as warranties or otherwise (*Modern Order of Prætorians v. Kennedy* [Okla.] 157 Pac. 926).

Condition of reinstating a policy holder who had been suspended that on death from any cause within a certain time from reinstatement the insurer should not be liable and beneficiary's acceptance of such condition is not against public policy.

Young v. Æolian Council No. 17, 59 Pa. Super. Ct. 174; *American Nat. Ins. Co. v. Otis*, 122 Ark. 219, 183 S. W. 183, L. R. A. 1916E, 875.

2398-2400. (c) Same—Proceedings to reinstate

2398 (c). Where the right to reinstatement is limited by the contract or by-laws to a certain time, the insured must take advantage of the privilege granted within the time limited, or the right to reinstatement will be lost.

Delaney v. Kelly, 92 N. Y. Supp. 1021, 103 App. Div. 409, reversing 92 N. Y. Supp. 265, 45 Misc. Rep. 286; (Err. & App. 1911) *Johnson v. Grand Lodge A. O. U. W. of New Jersey*, 81 N. J. Law, 511, 79 Atl. 333, affirming judgment 79 N. J. Law, 227, 75 Atl. 801; *Rewitzer v. Switchmen's Union of North America*, 98 N. Y. Supp. 974, 112 App. Div. 708.

Compliance with the conditions of the contract or by-laws in that regard is necessary to effect a reinstatement.

Kennedy v. Grand Fraternity, 92 Pac. 971, 36 Mont. 325, 25 L. R. A. (N. S.) 78; *Rome Industrial Ins. Co. v. Eldson*, 142 Ga. 253, 82 S. E. 641; *Smith v. Northwestern Nat. Life Ins. Co.*, 102 N. W. 57,

123 Wis. 586; *Locomotive Engineers' Mut. Life & Accident Ins. Ass'n v. Thomas*, 206 Fed. 409, 124 C. C. A. 291; *Lesseps v. Fidelity Mut. Life Ins. Co. of Philadelphia*, 120 La. 610, 45 South. 522; *Popovitz v. United States Health & Accident Ins. Co.*, 187 N. Y. Supp. 788, 78 Misc. Rep. 148; *American Nat. Ins. Co. v. Gallimore* (Tex. Civ. App.) 166 S. W. 17; *Stanton v. Eccentric Ass'n of Firemen*, Local Union No. 56, of International Brotherhood of Stationary Firemen, 114 N. Y. Supp. 480, 130 App. Div. 129; *National Life Ins. Co. v. Manning*, 86 S. W. 618, 38 Tex. Civ. App. 498; *People v. Chapter General of America, Knights of St. John and Malta*, 90 N. E. 1184, 198 N. Y. 15, modifying 116 N. Y. Supp. 985, 132 App. Div. 410; *Warner v. Modern Woodmen of America*, 96 S. W. 222, 119 Mo. App. 222; *Edgerly v. Ladies of the Modern Maccabees*, 185 Mich. 148, 151 N. W. 692.

An application for reinstatement of life insurance on a form prepared by the company must, however, be construed against the company (*Stanyan v. Security Mut. Life Ins. Co.* [Vt.] 99 Atl. 417, L. R. A. 1917C, 350).

Where there was nothing in the by-laws and rules of a fraternal insurance order, or in the certificate of insurance, to prevent the collector of assessments from paying the assessment of the insured, a payment by her of his assessment reinstated his insurance (*Walker v. United Order of the Golden Star*, 212 Mass. 289, 98 N. E. 1039, Ann. Cas. 1913D, 345). A fraternal association member's reinstatement was not vitiated by his failure to pay a rate for the current month, where he had the whole month in which to pay it and such payment was not required by the rules as a condition for reinstatement (*Lounsbury v. Knights of Maccabees of the World*, 112 N. Y. Supp. 921, 128 App. Div. 394, order affirmed 93 N. E. 377, 199 N. Y. 573). Where, however, insured failed to pay a premium note whereby the policy was forfeited under its terms and notice given thereof, a subsequent collection of such note on an expressed understanding that it was paid in payment of a past-due premium, and that insured had no claim on the policy, did not revive the same (*Lesseps v. Fidelity Mut. Life Ins. Co. of Philadelphia*, 120 La. 610, 45 South. 522).

In *Godwin v. National Council Knights and Ladies of Security*, 148 S. W. 980, 166 Mo. App. 289, it was held that a provision in the by-laws of a fraternal beneficiary association that the receipt and retention of delinquent dues and assessments in case suspended member is not in good health shall not reinstate the member is invalid. So in *Forney v. Fidelity Mut. Life Ins. Co.*, 124 Pac. 406, 87 Kan. 397, it was held that, where an insurance policy provided that

a revival could be had by payment of arrears, and insured made a partial payment and applied for revival which was not approved because a balance due had not been paid, but as a matter of fact insured had paid such balance to the company's agent, the policy will be deemed to have been in force.

In *Melvin v. Piedmont Mut. Life Ins. Co.*, 64 S. E. 180, 150 N. C. 398, 134 Am. St. Rep. 943, however, it was held that a mere partial payment of arrears of premiums by insured in a policy stipulating for reinstatement on payment of all dues, etc., does not work a reinstatement, in the absence of an agreement.

Even though insured's agent did not know that insured was ill when he paid overdue assessments so as to reinstate insured after forfeiture, the transaction would be subject to the same infirmities as if the agent actually knew of insured's illness at the time; insured's knowledge being that of his agent (*United Order of the Golden Cross v. Hooser*, 160 Ala. 334, 49 South. 354).

In *Proctor v. United Order of The Golden Star*, 89 N. E. 1042, 203 Mass. 587, 25 L. R. A. (N. S.) 370, it was held that a beneficiary in a certificate does not have such a vested interest therein as to entitle him to pay a past-due assessment without a member's consent, so as to reinstate the latter.

The constitution of a fraternal order, providing that a member who has been suspended for more than six months must apply for membership on the same terms and conditions as any person who has not been a member, except that he shall not be required to be again formally introduced in the ritual, does not exempt such member from taking an obligation, required by the order as a condition precedent to membership agreeing to pay all dues and assessments, and that he is in sound health (*Sterling v. Head Camp*, Pacific Jurisdiction, *Woodmen of the World*, 80 Pac. 375, 28 Utah, 505, rehearing denied 80 Pac. 1110, 28 Utah, 526). On the other hand, where a life policy provided that after lapse thereof for nonpayment of an assessment, insured might have the policy fully restored upon paying the arrears of premium, with interest, and furnishing the company evidence of his insurability, satisfactory to it, by submitting to an examination by defendant's medical examiner, the company had no right to arbitrarily refuse approval or to act on information as to insured's health and habits, secretly obtained, without opportunity for insured to meet it (*Leonard v. Prudential Ins. Co.*, 107 N. W. 646, 128 Wis. 348, 116 Am. St. Rep. 50).

Though the constitution of a mutual benefit society provided that

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a district recorder was an agent of the district court, and not an agent of the supreme body, it appearing that, on the suspension of a member, if he paid his dues to the district recorder, he was thereupon reinstated, the district recorder, in receiving such dues, acted as the agent of the supreme body (*Court of Honor v. Dinger*, 77 N. E. 557, 221 Ill. 176, affirming judgment 123 Ill. App. 406). So, where a member of a mutual benefit society, in arrears for dues, but entitled to reinstatement, paid an insufficient amount for that purpose to the collector, which he received as the amount necessary to accomplish a reinstatement, the mistake, in the absence of proof that the person making the payment knew she was not paying enough, and with that knowledge deliberately misled the collector, was his mistake, for which the society, and not the member, was responsible (*Grand Lodge [Colored] K. P. of Mississippi v. Jones*, 100 Miss. 467, 56 South. 458).

For adjudications under various particular provisions in regard to reinstatement, see the following cases:

Stanton v. Eccentric Ass'n of Firemen, Local Union No. 56 of International Brotherhood of Stationary Firemen, 114 N. Y. Supp. 480, 130 App. Div. 129; *Butler v. Grand Lodge A. O. U. W.*, 79 Pac. 861, 146 Cal. 172; *Kennedy v. Grand Fraternity*, 92 Pac. 971, 36 Mont. 325, 25 L. R. A. (N. S.) 78; *Brotherhood of Ry. Trainmen v. Dee*, 101 Tex. 597, 111 S. W. 396, reversing (Tex. Civ. App.) 108 S. W. 492; *Conway v. Minnesota Mut. Life Ins. Co.*, 62 Wash. 49, 112 Pac. 1106, 40 L. R. A. (N. S.) 148; *Wichman v. Metropolitan Life Ins. Co.*, 96 S. W. 695, 120 Mo. App. 51; *Osterhoudt v. Prudential Ins. Co. of America*, 120 N. Y. Supp. 641, 136 App. Div. 123; *Kennedy v. Grand Fraternity*, 92 Pac. 971, 36 Mont. 325, 25 L. R. A. (N. S.) 78; *Scheiber v. Protected Home Circle*, 146 Ill. App. 574; *Lane v. Fidelity Mut. Life Ins. Co.*, 54 S. E. 854, 142 N. C. 55, 115 Am. St. Rep. 729; *McCormick v. New York Life Ins. Co.*, 141 N. Y. Supp. 993, 156 App. Div. 406.

2400-2404. (d) Same—Condition as to good health

2400 (d). Under provisions authorizing reinstatement of persons in good health, a reinstatement obtained by one not in good health, without the association's knowledge thereof, may be repudiated unless the association has waived the matter or is estopped.

Squires v. Modern Brotherhood of America, 68 Or. 336, 135 Pac. 774; *Busta v. Court of Honor*, 172 Ill. App. 71; *Smoot v. Bankers' Life Ass'n*, 120 S. W. 719, 138 Mo. App. 438; *Bixler v. Modern Woodmen of America*, 112 Va. 678, 72 S. E. 704, 38 L. R. A. (N. S.) 571; *Warner v. Modern Woodmen of America*, 96 S. W. 222, 119 Mo. App. 222; *United States Indemnity Soc. v. Griggs*, 118 Ill.

App. 577; *Greenwaldt v. United States Health & Accident Ins. Co.*, 102 N. Y. Supp. 157, 52 Misc. Rep. 353; *Hartman v. National Council of Knights and Ladies of Security*, 76 Or. 153, 147 Pac. 931, L. R. A. 1915F, 152; *Sovereign Camp Woodmen of the World v. Wagon* (Tex. Civ. App.) 164 S. W. 1082; *Royal Benefit Society v. Naylor*, 14 Ga. App. 202, 80 S. E. 545; *Gagne v. Massachusetts Bonding & Ins. Co.* (N. H.) 101 Atl. 212 (under statute).

False representations as to good health in a petition for reinstatement in a mutual benefit association, will avoid the insurance when material to the risk, though ignorantly made, especially where their truth is expressly warranted.

O'Connor v. Knights and Ladies of Security (Iowa) 158 N. W. 761, L. R. A. 1917B, 897; *Supreme Ruling of Fraternal Mystic Circle v. Hansen*, 161 S. W. 54; *Spoeri v. Modern Brotherhood of America*, 184 Ill. App. 32; *Supreme Ruling of Fraternal Mystic Circle v. Hansen* (Tex. Civ. App.) 153 S. W. 351; *Smith v. Mystic Workers of the World* (Mo. App.) 196 S. W. 62.

Where a mutual benefit certificate or the by-laws of the association do not require the insured to be in good health as a condition to reinstatement upon the payment of arrears, it is not necessary that he be in good health in order to be so reinstated.

Mutual Life Ins. Ass'n of Donley County v. Rhoderick (Tex. Civ. App.) 164 S. W. 1067; *Walker v. United Order of the Golden Star*, 212 Mass. 289, 98 N. E. 1039, Ann. Cas. 1913D, 345; *Arrison v. Supreme Council of Mystic Tollers*, 105 N. W. 580, 129 Iowa, 303; *Grand Lodge (Colored) K. P. of Mississippi v. Jones*, 100 Miss. 467, 56 South. 458.

But a suspended member of a fraternal benefit society has no vested right to reinstatement without a health certificate, under an order permitting it, which prevents the revocation of that order (*Edgerly v. Ladies of the Modern Maccabees*, 185 Mich. 148, 151 N. W. 692).

Where a discretion is vested in an officer of a mutual benefit society as to approval of an application for reinstatement of a member after his suspension for nonpayment of dues, if there is any doubt in the mind of the officer having to pass on the sufficiency of the evidence of the good health of the member, then the officer may exercise his judgment, and if a decision is reached adverse to the applicant he cannot complain.

Lane v. Fidelity Mut. Life Ins. Co., 54 S. E. 854, 142 N. C. 55, 115 Am. St. Rep. 729; *Kennedy v. Grand Fraternity*, 92 Pac. 971, 36 Mont. 325, 25 L. R. A. (N. S.) 78.

A policy in a mutual benefit association, forfeited by a failure of the insured to pay assessments, was not revived by an unaccepted tender of the arrearages, made in behalf of insured at a time when it was known that he could not live (*Hawkins v. Lone Star Ins. Union* [Tex. Civ. App.] 146 S. W. 1041). If a by-law of a fraternal benefit society provides that reinstatement may be had by a member if in good health by paying his arrearages, it is incumbent upon the society to ascertain the condition of the health of the member at such time, and in the absence of fraud his reinstatement is binding upon the society (*Court of Honor v. Dinger*, 123 Ill. App. 406, judgment affirmed 77 N. E. 557, 221 Ill. 176). If a suspended member of a fraternal beneficiary society enjoys such health and strength as to justify a reasonable belief, on the part of himself and others, that he is free from serious organic trouble, or from symptoms calculated to cause a reasonable apprehension of such derangement, and if to ordinary observers and outward appearance his health is reasonably such that he might, with ordinary safety, be insured, and upon ordinary terms, the requirement of "good health," as a condition for reinstatement, is satisfied (*Johnson v. Modern Woodmen of America*, 160 Ill. App. 37).

In *McIntyre v. Modern Woodmen of America*, 200 Fed. 1, 121 C. C. A. 1, an action on a mutual benefit certificate, whether insured was afflicted with syphilis at the time of a prior reinstatement so as to render the certificate void was held to be a question for the jury.

The word "killed" as used in the constitution, providing that a benefit shall be paid to the beneficiaries named in the certificate "in case of death by accident," but that, if a member suspended for nonpayment of dues shall be "injured" during his delinquency, the delinquent shall receive no indemnity therefor, "nor shall his beneficiaries receive anything should he be 'killed' during such period of delinquency," and providing for reinstatement of the delinquent members, refers to the result of the accident, and not to the accident from which death ensues; and, where the death of a member occurred after his reinstatement, and while he was in good standing, his beneficiary was entitled to benefits, though the accident from which death ensued occurred during the member's delinquency (*Roth v. Travelers' Protective Ass'n of America*, 102 Tex. 241, 115 S. W. 31, 132 Am. St. Rep. 871, 20 Ann. Cas. 97, affirming [Tex. Civ. App.] 108 S. W. 1039).

Evidence that insured was intemperate when reinstated is alone insufficient to show that he was not in good health at that time. Su-

preme Tribe of Ben Hur v. Cosgrove, 169 S. W. 999, 160 Ky. 595, 161 Ky. 484.

But constitution of mutual benefit insurance society requiring for readmission of member who has been out of country certificate of its physician that he is "physically and mentally sound" is not satisfied by one that he is "still sick with indigestion, but improving" (*Societa Unione Fratellanza Italiana v. Leyden*, 114 N. E. 738, 225 Mass. 540, L. R. A. 1917C, 256).

Where a life policy provided that a lapsed policy might be revived on payment of arrears and the presentation of evidence satisfactory to the company of the sound health of insured, it was error to charge that evidence of health ought to have been strong enough to have been satisfactory to the company, or to have been satisfactory to a reasonable man. *Rome Industrial Ins. Co. v. Eldson*, 75 S. E. 657, 138 Ga. 592.

2404-2406. (c) Same—Waiver of conditions

2404 (c). When an association, with knowledge of a member's poor health, reinstates her and continues to receive her dues, it waives the right to assert that the reinstatement was invalid.

Pegram v. Mutual Protective League, 159 Ill. App. 214; *Shultice v. Modern Woodmen of America*, 67 Wash. 65, 120 Pac. 531; *Henton v. Sovereign Camp of Woodmen of the World*, 87 Neb. 552, 127 N. W. 869, 138 Am. St. Rep. 500; *Mosiman v. Occidental Mut. Ben. Ass'n*, 109 Pac. 413, 82 Kan. 670; *Squires v. Modern Brotherhood of America*, 68 Or. 336, 135 Pac. 774.

In *Henton v. Sovereign Camp of Woodmen of the World*, 87 Neb. 552, 127 N. W. 869, 138 Am. St. Rep. 500, it was held that a fraternal beneficiary association may be bound by the action of a local camp clerk who collects arrearages from a member suspended for nonpayment of assessments and restores his name to the membership list without demanding or receiving a health certificate required by the by-laws, where the clerk acts with full knowledge that the member is sick at the time, and where there is no fraud on the member's part. So, uniform conduct of a subordinate lodge in accepting assessments after the same became due, without requiring certificates of good health, is a waiver of a compliance by the insured with the provisions of the by-laws with reference to reinstatement (*Walker v. American Order of Foresters*, 162 Ill. App. 30).

In *Hartman v. National Council of Knights and Ladies of Security*, 76 Or. 153, 147 Pac. 931, L. R. A. 1915F, 152, however, the

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acceptance by a local lodge officer of arrearages from a suspended member, known to be sick, was not a waiver of the by-law against reinstatement while not in good health.

If the rule of a fraternal association requiring applications for reinstatement to be in writing had been disregarded for some time, to the association's knowledge, and a member had been led to suppose that it was not essential, his reinstatement was valid, though the application was verbal (*Lounsbury v. Knights of Maccabees of the World*, 112 N. Y. S. 921, 128 App. Div. 394, order affirmed [1910] 93 N. E. 377, 199 N. Y. 573). So, a subordinate council formally appropriating or lending money to a member to effect his reinstatement, coupled with the fact that the reinstatement was formally declared, was sufficient, notwithstanding the by-laws of the society provided a different method for effecting reinstatement (*Klauss v. National Council, Knights and Ladies of Security*, 170 Ill. App. 196).

In *Perkins v. Philadelphia Life Ins. Co.*, 76 S. E. 29, 93 S. C. 88, an offer by an insurance company to reinstate a lapsed policy on payment of premiums before a certain date if insured was then living was held not a waiver of the nonpayment of the premiums where insured died before the date specified. So, the provision of the by-laws of a fraternal benefit order that a "member suspended by reason of nonpayment of assessments may be reinstated on" certain conditions, "if living and in good health as when suspended," is not waived by the acceptance of overdue assessments after the death of the suspended member (*Dillon v. National Council Knights and Ladies of Security*, 91 N. E. 417, 244 Ill. 202, affirming judgment 148 Ill. App. 121).

In *Societa Unione Fratellanza Italiana v. Leyden*, 114 N. E. 738, 225 Mass. 540, L. R. A. 1917C, 256, it was held that certificate of doctor required by constitution of mutual benefit insurance society as condition to readmission of member cannot be waived by the corporation itself, so that no estoppel arises from attempt to readmit and subsequent acceptance of dues.

2406-2407. (f) Same—Effect of reinstatement

2406 (f). In *McCormack v. Security Mutual Life Ins. Co.*, 146 N. Y. Supp. 613, 161 App. Div. 33, where a policy, containing a clause providing that it should be incontestable after one year, was reinstated after forfeiture for nonpayment of premiums, it was held that the reinstatement related back to the time of the forfeiture, and

the reinstated policy became incontestable within one year from that date.

In *McRaith v. Grand Lodge, A. O. U. W.*, 149 Iowa, 148, 126 N. W. 321, it was held that, where a suspended member of a fraternal insurance order is readmitted pursuant to its rules, providing for reinstatement of suspended members, and declaring that, on compliance therewith, the beneficiary certificate shall be held renewed, the issuance of another certificate is unnecessary on the reinstatement of a suspended member, and, though another certificate is then issued, the original certificate is revived and continued in force, and a recovery must be predicated on the original certificate as thus renewed. So plaintiff is entitled to recover under by-laws of local and national order a death benefit for the death of a member who, though in arrears, had paid the arrearages and become automatically a member in good standing (*National Council, Junior Order United American Mechanics, v. Barbour*, 96 Atl. 290, 127 Md. 97).

In *Johnson v. Modern Woodmen of America*, 160 Ill. App. 37, it was held that, if the reinstatement of a suspended member of a fraternal beneficiary society was allowed by the society without fraud or concealment practiced upon it, without medical examination made by it, such society will not, after continuing to receive assessments and not moving in the lifetime of the insured to set aside the reinstatement, be allowed to enforce a forfeiture after death as against the beneficiary.

2407-2413. (g) Right to extended insurance for a limited term

2407 (g). Many ordinary life policies provide that if, after a specified number of yearly premiums have been paid, there is a default in the payment of a premium, the net reserve value of the policy, less any indebtedness due on account of the policy, shall be applied as a net single premium to purchase term insurance for a certain determinable period, proportionate to the amount of such net reserve. In some states statutes have been passed containing substantially the same provisions. The provision is usually one of three options given to the insured; i. e.: (1) To take extended insurance as explained above; (2) to apply the net reserve as a single premium to purchase a paid-up policy for a determinable amount proportionate to such net reserve; or (3) to surrender the policy and take the cash surrender value determinable according to the number of yearly premiums paid. The statutory provisions, while

intended to produce identical results, vary in detail, so that decisions construing a particular statute are of little value in other jurisdictions. A few propositions applicable in all cases may, however, be deduced from the decisions.

The Missouri statute (Rev. St. 1899, § 7897) becomes a part of the contract in the form in which it exists at the time the contract is made, and prohibits any subsequent change or modification thereof between the parties thereto affecting the application of the net value of the insurance (*Christensen v. New York Life Ins. Co.*, 160 Mo. App. 486, 141 S. W. 6). On the other hand, it was held in *Equitable Life Assur. Soc. v. Babbitt*, 11 Ariz. 116, 89 Pac. 531, 13 L. R. A. (N. S.) 1046, that the Arizona statute (Rev. St. 1901, par. 809) does not read into a policy the provision as to term insurance, but merely imposes a penalty for a failure to insert such condition.

The Missouri statute is not applicable to fraternal beneficiary associations doing business on the assessment plan, and under the laws of which assessments and the liability of the association are not permanently established (*Westerman v. Supreme Lodge K. P.*, 94 S. W. 470, 196 Mo. 670, 5 L. R. A. [N. S.] 1114). But it has been held in Indiana that a company organized on the assessment plan may contract for extended insurance (*Federal Life Ins. Co. v. Arnold*, 46 Ind. App. 114, 90 N. E. 493, rehearing denied 46 Ind. App. 114, 91 N. E. 357). The inclusion in a policy of an accident clause does not prevent its being a "policy of insurance on life," within the Missouri statute providing for extended insurance (*Moore v. Northwestern Nat. Life Ins. Co.*, 87 S. W. 988, 112 Mo. App. 696).

The Missouri nonforfeiture law (Rev. St. 1899, § 7897 et seq., now Rev. St. 1909, § 6946 et seq.), is as applicable to policies which do not contain forfeiture or incontestability clauses as those which do, and disposes of the whole matter of forfeiture for nonpayment of premiums (*Liebing v. Mutual Life Ins. Co.*, 269 Mo. 509, 191 S. W. 250). A provision for certain terms of continued insurance upon failure of insured to pay premiums when under no indebtedness to the company is unaffected in that respect by agreement that premiums should be paid quarterly instead of annually (*Clark v. New York Life Ins. Co.*, 85 S. E. 594, 101 S. C. 258).

The provision in an endowment life policy for surrender charge of 1 per cent. of policy in case of either paid-up or extended insurance is contrary to Ky. St. § 659, subds. 2, 4, relative to forfeiture of life policies for nonpayment of premiums, etc., and void. *Peak v. Mutual Benefit Life Ins. Co.*, 189 S. W. 195, 172 Ky. 245.

Under Rev. Laws Mass. 1902, c. 118, § 76, where insured under Massachusetts policy has defaulted in payment of premium, beneficiary cannot exercise option of extended insurance, but can recover only paid-up value. *McDonald v. Columbian Nat. Life Ins. Co.*, 97 Atl. 1086, 253 Pa. 239, L. R. A. 1916F, 1244.

2408 (g). The nonpayment of a note given for a premium will not in itself necessarily deprive the insured of his right to extended insurance.

Kelsey v. Union Cent. Life Ins. Co., 196 Fed. 195, 116 C. C. A. 27; *New York Life Ins. Co. v. Van Meter's Adm'r*, 137 Ky. 4, 121 S. W. 438, 136 Am. St. Rep. 282; *Hayes v. New York Life Ins. Co.*, 68 Misc. Rep. 558, 124 N. Y. Supp. 792.

But it was held in *Bank of Commerce v. New York Life Ins. Co.*, 125 Ga. 552, 54 S. E. 643, that the acceptance of a part of a premium due in cash, and for the balance a promissory note which contains a stipulation that it is payable without grace, and that "all benefits whatever, which full payment in cash of said premium would have secured, shall become immediately void and be forfeited to the New York Life Insurance Company, if this note is not paid at maturity, except as otherwise provided in the policy itself," will not operate to give the holder of the policy the benefit of an extension of the contract of insurance provided by its terms, when the policy stipulates that such extension is to be effected by the payment of premiums, where the note itself is not paid at maturity.

The insured is not bound to exercise any of the options so given him (*Haas v. Mutual Life Ins. Co.*, 134 N. W. 937, 90 Neb. 808, Ann. Cas. 1913B, 919). But, on the other hand, he may choose which of the options he will take (*McLeod v. John Hancock Mut. Life Ins. Co.*, 190 Mo. App. 653, 176 S. W. 234). Moreover, the failure of insured to demand a paid-up policy within 60 days after default in payment of premiums, the default occurring after the payment of two full annual premiums, as authorized by statute, does not deprive him of the right to extended insurance (*Capp v. Security Mut. Life Ins. Co.*, 94 S. W. 734, 117 Mo. App. 532).

Where, after default, the insured applied for reinstatement under the terms of the policy, which was refused, there was no waiver of his right to extended insurance (*Hayes v. New York Life Ins. Co.*, 124 N. Y. Supp. 792, 68 Misc. Rep. 558). But, the signing of an application for renewal of insurance and the retention by the insured and beneficiary of a check for the surrender value of the policy constitute a waiver of the provision of the policy for extended in-

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surance after nonpayment of the premium (*Hayes v. New York Life Ins. Co.*, 104 N. E. 1122, 211 N. Y. 9, affirming judgment 135 N. Y. Supp. 1116, 150 App. Div. 927).

In some cases it has been held that, on the failure of the insured to exercise his option, the insurance is automatically extended.

United States Life Ins. Co. v. Spinks, 96 S. W. 889, 29 Ky. Law Rep. 960, 13 L. R. A. (N. S.) 1053, rehearing denied 103 S. W. 335, 126 Ky. 405, 31 Ky. Law Rep. 185; *Mutual Ben. Life Ins. Co. v. O'Brien* (Ky.) 116 S. W. 750. And see *Illinois Life Ins. Co. v. Wortham* (Ky.) 119 S. W. 802. But see *Michigan Mut. Life Ins. Co. v. Mayfield's Adm'r*, 121 Ky. 839, 90 S. W. 607, where the policy provided that insured on default after payment of three annual premiums, might, by giving notice to the insurer within 30 days, elect, in lieu of the paid-up insurance provided for, to take extended insurance, and it was held that, as the provision for paid-up insurance went into force automatically on default in the payment of the premium, the insured could not substitute the extended insurance without making an election so to do.

If the policies, containing a provision that, in case of a failure to pay premiums, they should automatically be turned into policies for term insurance, were canceled under a contract voidable because of insured's insanity, the trial court, on vacating the surrender, should treat the policies as term insurance under such provision (*New York Life Ins. Co. v. Hagler* [Tex. Civ. App.] 169 S. W. 1064). It has been held in Georgia that, under an "automatically nonforfeitable clause" on insured's failure to pay a premium, it was the company's duty to charge against the policy as a loan the amount due for that premium, and thus retain the policy in force for a length of time authorized by the "table of cash loans and guaranteed surrender value" contained in the policy, though the premium was represented by a note (*Perkins v. Empire Life Ins. Co.*, 17 Ga. App. 658, 87 S. E. 1094). Under such a clause it was necessary in order to sustain policy by its own loan value, that such loan value be sufficient to cover interest, as well as principal debt, both as to cash under loan clause and premiums charged as loans under automatic nonforfeiture clause (*State Mut. Life Ins. Co. v. Forrest*, 19 Ga. App. 296, 91 S. E. 428).

The option given by the policy or statute is not personal to the insured alone, but, subject to the conditions imposed, may be exercised after the death of the insured by the beneficiary or the legal representative of insured.

Veal v. Security Mut. Life Ins. Co., 6 Ga. App. 721, 65 S. E. 714; *McEachern v. New York Life Ins. Co.*, 15 Ga. App. 222, 82 S. E. 820;

State Mut. Life Ins. Co. v. Forrest, 19 Ga. App. 296, 91 S. E. 428;
New York Life Ins. Co. v. Noble, 34 Okl. 103, 124 Pac. 612.

But in *Sugg v. Equitable Life Assur. Soc.*, 116 Tenn. 658, 94 S. W. 936, the policy provided that there should be granted, "without any action on the part of the assured, paid-up life assurance for the amount fixed in said table, or in lieu thereof, at the option of the assured, (1) the cash value fixed in said table on surrender of the policy, or, (2) provided this policy is surrendered within the days of grace, or with satisfactory evidence of good health within one year thereafter, a paid-up term policy for the time stated in said table." It was held that, on the death of assured after failure to pay a premium and failure to exercise any option, the beneficiary was only entitled to the proceeds of a paid-up policy, and not to the proceeds of term insurance.

In order to entitle one to extended insurance, the full number of yearly premiums must have been paid. Hence, where extended insurance was granted after the payment of three yearly premiums, insured was not entitled to term insurance if he defaulted in the payment of the third premium (*Letzler's Adm'r v. Pacific Mut. Life Ins. Co.*, 119 Ky. 924, 85 S. W. 177). In *McGeehan v. Mutual Life Ins. Co.*, 131 Mo. App. 417, 111 S. W. 604, a policy issued by a foreign insurance company on the life of a nonresident called for semiannual premiums which were paid for a time. Insured became a resident of Missouri, and failed to pay premiums. Subsequently the policy was on his application re-established, after which he paid two semiannual premiums, and then defaulted. It was held that he was not within the Missouri statute, providing that after the payment of "two full annual premiums" a policy shall not be forfeited, etc., since insured could not connect the payment of premiums after the re-establishment of the policy with payments made before he became a resident of Missouri. In *McGuire v. Union Mut. Life Ins. Co.*, 114 App. Div. 344, 99 N. Y. Supp. 891, one insured in a 10-year term life policy exchanged it for a regular policy for a like amount, providing that, in case of lapse for nonpayment of premium after payment of three annual premiums, the holder should be entitled to the benefits of the provisions relating to extended insurance. The insured paid two annual premiums under the second policy, and failed to pay further premiums. It was held that, as the two policies were different, the second policy must be governed by its terms, and the insured was not entitled to the benefits of the provisions relating to extended insurance, though he had paid one an-

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nual premium under the first policy. But where the risks of insurer were transferred to another company, and the contract between the companies provided that any policy of the first company reinsured on which premiums were not paid when due should become ipso facto void, such contract between the companies had no effect on the policy holder's right to extended insurance as against the reinsuring company (*Federal Life Ins. Co. v. Arnold*, 46 Ind. App. 114, 90 N. E. 493, rehearing denied, 46 Ind. App. 114, 91 N. E. 357).

Under the Missouri statute providing for extended insurance the statement of an insurance company after premiums have been paid on a life policy for 9½ years that the policy is forfeited for nonpayment of premiums, is ineffectual, and hence does not constitute a breach of the contract for which the insured may recover (*Capp v. Security Mut. Life Ins. Co.*, 94 S. W. 734, 117 Mo. App. 532). But notwithstanding a statute, which by construction is a part of the contract itself, provides in the event of lapse the right to extended insurance shall exist, the parties may by agreement cancel such policy in toto (*Metropolitan Life Ins. Co. v. National Life Ins. Co.*, 127 Ill. App. 665, judgment affirmed 80 N. E. 747, 226 Ill. 102).

2409 (g). Where a life policy provides for an extension of the insurance on insured's application therefor, the application may be oral or written (*Wortham v. Illinois Life Ins. Co.*, 107 S. W. 276, 32 Ky. Law Rep. 827). The insurer is not required to give insured notice to make an election upon his failure to pay a premium, since, as insured has possession of the policy, and had notice of the time of the maturity of the premium, he must be presumed to have had knowledge of its provisions with reference to his rights (*Balthaser v. Illinois Life Ins. Co.*, 110 S. W. 258, 33 Ky. Law Rep. 283).

In *Balthaser v. Illinois Life Ins. Co.*, 33 Ky. Law Rep. 283, 110 S. W. 258, the policy provided that, if any premium should not be paid as agreed, the policy should then become void, except that insured upon failure to pay the third or any subsequent annual premium would be entitled to extended insurance, if applied for. Insured failed to pay the fourth premium, and did not apply for extended insurance, but died before the period of extension would have expired had it been applied for. It was held that, as insured did not elect to apply for the extended insurance as required by his policy, the right was lost, and neither his personal representative nor the beneficiary in the policy could do so after his death. So, too, where neither the insured in a life policy nor his beneficiary, after

a lapse in payment of premiums, elected to take extended instead of paid-up insurance, the beneficiary cannot claim the benefit of a statute entitling an insured to extended insurance if applied for within six months after lapse (*Equitable Life Assur. Society v. Cosby* [Ky.] 126 S. W. 142). On the other hand, in *Veal v. Security Mut. Life Ins. Co.*, 6 Ga. App. 721, 65 S. E. 714, it was said that as long as insured lives time is of the essence of the option, to be exercised within six months, given by a policy, of either a cash value, extended insurance, or a paid-up policy, and his choice must be exercised within the time prescribed, but, if insured dies after a lapse and before expiration of the six months, as against the beneficiary, time is no longer of the essence. Hence it was held that, upon the death of insured within six months of a lapse, where the extended insurance would have run beyond that period, the beneficiary is entitled to hold and sue upon the original policy as a death claim for its full face value. So, too, it was held in *Bartholomew v. Security Mut. Life Ins. Co.*, 140 App. Div. 88, 124 N. Y. Supp. 917, that, where insured died within six months after the policy lapsed, his death within that time operated as a substitute for notice and exercise of the option, and that the policy was automatically continued for such a length of time as the reserve applicable thereto would purchase temporary insurance. Similarly, in *Clappenback v. New York Life Ins. Co.*, 136 Wis. 626, 118 N. W. 245, where the policy provided that, if any premium was not duly paid, the policy would be indorsed for the amount of paid-up insurance specified in the attached table, on written request therefor within six months from the date of default in payment, and, if no request was made, the insurance shall automatically continue from that date for \$1,000 for the term specified in the table, it was held that insured had the entire six months in which to exercise his option either to continue the insurance or accept the paid-up policy, and the full insurance continued for the entire six months, irrespective of when he exercised his option.

Under a policy making the annual premiums due in advance on a specified day, and allowing 30 days of grace for such payment, the premiums are paid to the next due date, and not to the end of the 30 days of grace, as affecting the expiration of an extension of insurance on a failure to pay a premium. And to the same effect is *Hutchinson v. National Life Ins. Co.*, 195 S. W. 66, 196 Mo. App. 510. Consequently, though a policy was issued and dated December 2d, if it provided for payment of premiums on November 22d, that

date would mark the beginning of the extension period (*Wilkie v. New York Life Ins. Co.*, 146 N. C. 513, 60 S. E. 427). Similarly, where a policy was issued on January 15th, but provided that premiums should be paid November 11th, that date determined the beginning of the extension period (*Johnson v. Mutual Ben. Life Ins. Co.*, 75 C. C. A. 22, 143 Fed. 950). In *Prudential Ins. Co. v. Chestnut*, 8 Ga. App. 246, 68 S. E. 952, the policy provided that, if the policy after being in force one year should lapse for nonpayment of premium, the company would continue in force the insurance under the policy for 60 days from the due date of such premium, and, if the policy should lapse after being in force for two years for nonpayment of premium, the company would continue in force the insurance thereunder for 120 days from the due date of such premium. It was held that, if the quarterly premiums were paid for 2½ years up to and including the one due on December 21, 1908, there would be extended insurance for 120 days from the following March 21st, which would make the policy in force on July 8, 1909, when insured died.

Under a provision in a life insurance policy that on payment of three premiums in cash the policy should be continued in force for 7 years and 235 days, such period should be computed from the date of the policy, and not from the date of the lapse (*Union Mut. Life Ins. Co. v. Adler*, 73 N. E. 835, 38 Ind. App. 530, rehearing denied 75 N. E. 1088, 38 Ind. App. 530). So, where the policy provided for extended insurance and contained a table printed on the back, which showed that, on the payment of six premiums before lapse, the insurance was secured for 11 years, 288 days, such table should be construed as meaning that the life of the policy was 11 years, 288 days, and not 17 years, 288 days (*Dakan v. Union Mut. Life Ins. Co.*, 102 S. W. 634, 125 Mo. App. 451).

Where a life policy clearly stated in the table attached thereto how long it would continue on nonpayment of premiums, the table governs, and it cannot be extended on the theory of ambiguity. *Cabell v. Mutual Ben. Life Ins. Co.*, 163 S. W. 1119, 157 Ky. 752.

Where a policy of life insurance provides that it is entitled to the benefits of the Maine nonforfeiture law, under which a policy, after being in force three years, is continued in force, by applying a certain portion of the net value of the policy as a net single premium of temporary insurance, and such policy contains in a margin a tabulated statement entitled "Insurance under this policy secured for," wherein the respective numbers of years and days appearing

opposite to different numbers in a column entitled "Annual premiums paid in cash before lapse" according to the testimony of actuaries include the entire period of insurance indemnity in each case under such law, even if such tabulated statement be assumed to be a part of the policy, the word "secured," according to its natural significance, is to be construed as indicating the duration of the entire periods of insurance, including the years for which premiums were paid, and not the periods for which such insurance is extended (*Sisson v. Union Mut. Life Ins. Co.*, 177 Ill. App. 588). So, where a policy provided that the manner of ascertaining the term of extended insurance should be determined by the Maine nonforfeiture law, and the actuaries' computation in accordance with the law extended the policy for only 5 years, 339 days, a table printed on the back of the policy showing that such extension was 11 years, 288 days, which table was not referred to in the policy nor made a part thereof, was ineffective to control the policy provision (*Dakan v. Union Mut. Life Ins. Co.*, 102 S. W. 634, 125 Mo. App. 451).

In *Perry v. Prudential Ins. Co.*, 144 App. Div. 780, 129 N. Y. Supp. 751, the policy provided that the insured might borrow from the company a specified amount in accordance with the company's loan certificate. The table for extended insurance provided that, when premiums had been paid for eight years, the insurance should be extended 7 years and 26 days. The premiums were paid for eight years. The insured borrowed the stipulated sum and executed a loan certificate, modifying the loan agreement and the rules of the company, so that the period of extended insurance was reduced to one year and eighty-one days from the lapse of the policy, which occurred May 9, 1908. The insured died May 24, 1910, and within the time named in the policy as the extended period. It was held that the extension period as fixed by the loan certificate applied and had expired before the death of the insured.

In *Bartholomew v. Security Mut. Life Ins. Co.*, 140 App. Div. 88, 124 N. Y. Supp. 917, the facts were these: The New York Insurance Law (Laws 1892, c. 600) § 88, provides that, on forfeiture of a life policy for nonpayment of premiums, insured on his election within six months may have the policy continued in force by application of the reserve and dividends for such a length of time as the reserve and dividends would purchase temporary insurance for that amount at the age of insured at the time of the lapse. Insured, not having paid an annual premium when due, executed a note therefor containing an agreement that, if it was not paid when due, the

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policy should at once become null and void, and that insured should pay insurer at the rate of the premium stated in the policy for the insurance from the date when the premium fell due to the time when the policy ceased to be in force. The note was not paid at maturity, and within six months after its maturity insured died, of which the insurer was given immediate notice, and at this time there was available \$10.44 of reserve to continue the policy for the period of a year, 101 days. It was held that, at the death of insured, he was not liable for the whole amount of the premium note, but only for a proportionate amount of the premium for the time the policy was in force after the note was given, and, this sum being less than the amount available to purchase continued insurance for a period longer than the time that it had lapsed before insured died, the policy was in full force at the time of his death.

Where premiums were payable quarterly, and were paid up to September 21, 1908, and insured died July 8, 1909, and the policy, which was dated June 21, 1906, provided that if it was in force for 1 full year an extension of 60 days from the lapse, if for 2 full years 120 days from the lapse, and if for 3 full years 1 year and 177 days from the last payment of premium, will be granted, but that if premiums are paid in quarterly installments due allowance will be made for that portion of the year's premium which has been made, the policy was in force at the time of the death of insured (*Prudential Ins. Co. v. Chestnut*, 9 Ga. App. 781, 72 S. E. 170). Under the Missouri statute (Rev. St. 1909, § 6946), forbidding forfeiture for nonpayment of premiums and providing for extended insurance, a recovery of the entire amount of a policy of insurance, where its value was sufficient to pay for extended insurance beyond the death of the insured after a forfeiture, is proper (*Head v. New York Life Ins. Co.*, 241 Mo. 403, 147 S. W. 827, and 241 Mo. 420, 147 S. W. 832).

Computation of period of extended insurance, see *Taylor v. New York Life Ins. Co.*, 102 N. E. 524, 209 N. Y. 29, affirming judgment 138 N. Y. Supp. 1145, 153 App. Div. 940; *Taylor v. New York Life Ins. Co.*, 133 N. Y. Supp. 746, 148 App. Div. 815, reargument denied 134 N. Y. Supp. 1148, 149 App. Div. 936.

2410 (g). In computing the amount which is available for the purchase of extended insurance the premiums paid are taken as the basis for determining the net value.

Moore v. Northwestern Nat. Life Ins. Co., 87 S. W. 988, 112 Mo. App. 696; *Rose v. Franklin Life Ins. Co.*, 153 Mo. App. 90, 132 S. W. 613.

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The "net value," as computed under the Missouri statute, is the excess of the total premiums paid plus 4 per cent. compound interest over the actuarial cost of insurance (*Rose v. Franklin Life Ins. Co.*, 153 Mo. App. 90, 132 S. W. 613.) The "net value" of a policy, as provided in Ky. St. § 653, is equivalent to "reserve," and means that part of the annual premium which, according to the American experience table of mortality, must be set apart to meet the company's obligations to insured (*Jefferson v. New York Life Ins. Co.*, 151 Ky. 609, 152 S. W. 780).

Dividends due the insured must be taken into consideration in determining the amount available to purchase extended insurance.

United States Life Ins. Co. v. Spinks, 96 S. W. 889, 29 Ky. Law Rep. 960, 13 L. R. A. (N. S.) 1053, rehearing denied 103 S. W. 335, 126 Ky. 405, 31 Ky. Law Rep. 185; *Emig's Adm'r v. Mutual Ben. Life Ins. Co.*, 106 S. W. 230, 127 Ky. 588, 32 Ky. Law Rep. 484, 23 L. R. A. (N. S.) 828.

But see *Hutchinson v. National Life Ins. Co.*, 196 Mo. App. 510, 195 S. W. 66, holding that an unpaid dividend could not be considered as part of the "net value" to purchase extended insurance, under Rev. St. 1909, § 6946.

But dividends not yet due or not declared are not available.

Mutual Ben. Life Ins. Co. v. O'Brien (Ky.) 116 S. W. 750; *Mutual Ben. Life Ins. Co. v. Emig's Adm'r*, 141 S. W. 38, 145 Ky. 660; *Jefferson v. New York Life Ins. Co.*, 151 Ky. 609, 152 S. W. 780.

It was held in *Rose v. Missouri State Life Ins. Co.*, 165 Mo. App. 646, 148 S. W. 181, that where a policy is antedated and subject to a lien for the reserve that would have accumulated during the antedated period, a loan certificate, representing the net reserve that would have accumulated during the time a life insurance policy was antedated, is evidence of indebtedness on account of past-due premiums, which should be deducted from three-fourths of the net value of the policy to ascertain the balance applicable to purchase extended insurance, under Rev. St. 1909, § 6946. And to the same effect is *Boulware v. Missouri State Life Ins. Co.*, 176 Mo. App. 593, 159 S. W. 761. In *Hay v. Meridian Life & Trust Co.*, 57 Ind. App. 536, 105 N. E. 919, denying rehearing 57 Ind. App. 536, 101 N. E. 651, it was said that in computing the reserve upon a life policy for the period it was antedated, the reserve must be calculated as the terminal reserve for the end of the last year for which it was antedated.

2411 (g). Generally the policies provide that to determine the amount available to purchase extended insurance any indebtedness

due on account of loans on the policy must be deducted. Under such provisions only the balance left after such indebtedness has been deducted from the net reserve, is available.

Black v. Franklin Life Ins. Co., 67 S. E. 79, 133 Ga. 859; *Hay v. Meridian Life & Trust Co.*, 57 Ind. App. 536, 101 N. E. 651; *Emig's Adm'r v. Mutual Ben. Life Ins. Co.*, 106 S. W. 230, 127 Ky. 588, 32 Ky. Law Rep. 484, 23 L. R. A. (N. S.) 828; *Dibrell v. Citizens' Nat. Life Ins. Co.*, 153 S. W. 428, 152 Ky. 208; *Short's Adm'r v. Reserve Loan Life Ins. Co.*, 175 Ky. 554, 194 S. W. 773; *Pavy v. Franklin Life Ins. Co. of Illinois*, 51 South. 191, 125 La. 262; *Rustin v. Aetna Life Ins. Co. of Hartford, Conn.*, 98 Neb. 426, 153 N. W. 548; *Healy v. Prudential Ins. Co. of America (Sup.)* 140 N. Y. Supp. 505; *Mills v. National Life Ins. Co.*, 189 S. W. 691, 136 Tenn. 350; *Algoe v. Pacific Mut. Life Ins. Co. of California*, 91 Wash. 324, 157 Pac. 993, L. R. A. 1917A, 1237; *Stratton's Adm'r v. New York Life Ins. Co.*, 115 Va. 257, 78 S. E. 636.

There can, however, be no deduction if the policy does not provide therefor (*Francis v. Prudential Ins. Co.*, 243 Pa. 380, 90 Atl. 205), or if the policy provides other means for paying the indebtedness (*Bozeman's Adm'r v. Prudential Ins. Co.*, 130 Ky. 572, 113 S. W. 836).

Of course, if the entire reserve is exhausted by the loan on the policy, there can be no extended insurance.

Meridian Life Ins. Co. v. Hobbs (Ala.) 76 South. 429; *Jagoe v. Aetna Life Ins. Co.*, 96 S. W. 598, 123 Ky. 510, 29 Ky. Law Rep. 984; *Fidelity Mut. Life Ins. Co. v. Oliver*, 111 Miss. 133, 71 South. 302; *McCall v. International Life Ins. Co.*, 196 Mo. App. 318, 193 S. W. 860; *Rye v. New York Life Ins. Co.*, 88 Neb. 707, 130 N. W. 434; *Sexton v. Greensboro Life Ins. Co.*, 160 N. C. 597, 76 S. E. 535. And see *New York Life Ins. Co. v. Slocum*, 177 Fed. 842, 101 C. C. A. 56.

In *New York Life Ins. Co. v. Van Meter's Adm'r*, 137 Ky. 4, 121 S. W. 438, 136 Am. St. Rep. 282, the policy provided that if any subsequent premium was not paid, and the policy was not surrendered, the insurance, after repayment of any "indebtedness," would be extended without request or demand for a term specified in an accompanying table. A premium note provided that in settlement of any claim or benefit under the policy before the note should become fully paid the amount thereof should be deducted from the amount otherwise payable by the company. It was held that the term "indebtedness," as used in such nonforfeiture provision, did not include premium notes.

Under the Missouri statute (Rev. St. 1899, § 7897), deduction can be made only for indebtedness on account of past-due premiums, and not for loans on the policy not based on premiums.

Burridge v. New York Life Ins. Co., 211 Mo. 158, 109 S. W. 560; *Christensen v. New York Life Ins. Co.*, 152 Mo. App. 551, 134 S. W. 100; *Paschedag v. Metropolitan Life Ins. Co.*, 155 Mo. App. 185, 134 S. W. 102; *Christensen v. New York Life Ins. Co.*, 160 Mo. App. 486, 141 S. W. 6; *Gillen v. New York Life Ins. Co.*, 178 Mo. App. 89, 161 S. W. 667. See, also, as to construction of the Missouri statute, *Whittaker v. Mutual Life Ins. Co.*, 133 Mo. App. 664, 114 S. W. 53; *Fahle v. Connecticut Mut. Life Ins. Co.*, 155 Mo. App. 15, 134 S. W. 60; *Mun v. New York Life Ins. Co.* (Mo. App.) 181 S. W. 606; *Pope v. New York Life Ins. Co.*, 192 Mo. App. 383, 181 S. W. 1047. And see *Ruane v. Manhattan Life Ins. Co.*, 194 Mo. App. 214, 186 S. W. 1188; *Payne v. Minnesota Mut. Life Ins. Co.*, 195 Mo. App. 512, 191 S. W. 695.

Insurer cannot, by computing only three-fourths of reserve as applicable to extended term insurance, after default of premium, etc., discriminate as against policy holder borrowing under policy loan agreement, so that where full reserve would have extended insurance beyond insured's death, assignee of his beneficiary might recover (*New York Life Ins. Co. v. Scheuer* [Ala.] 73 South. 409).

2413-2417. (h) Right to paid-up policy

2413 (h). A life policy stipulating that, if any premium due is not duly paid, the policy will become an automatically paid-up insurance, binds insured to pay the premiums within the time allowed or the policy becomes an automatically paid-up insurance, unless nonpayment of a premium is waived by insurer.

United States Life Ins. Co. of New York v. Wood, 107 S. W. 1193, 32 Ky. Law Rep. 1120; *Crook v. New York Life Ins. Co.*, 75 Atl. 388, 112 Md. 268; *Warren v. Postal Life Ins. Co.*, 148 N. Y. Supp. 1024, 163 App. Div. 638; *New York Life Ins. Co. v. Conner*, 160 S. W. 491, 155 Ky. 779; *Lichtenhan v. Prudential Ins. Co. of America*, 191 Ill. App. 412; *Tyson v. Equitable Life Assur. Soc. of United States*, 87 S. E. 1055, 144 Ga. 729.

In *Equitable Life Assur. Society of United States v. Wilson*, 66 S. E. 836, 110 Va. 571, it was held that, where the provision of a life policy that demand for a paid-up policy must be made within six months after the lapse of the original policy was not printed in type of the size required by statute, nor written, the limitation was invalid as against insured or his beneficiary.

It is not essential for an action to compel the issuing of a paid-up

life policy in place of one allowed to lapse that there should have been a surrender or offer to surrender the lapsed policy, there having been an unconditional refusal to issue a paid-up policy on the ground that the other policy was without value, and no longer in force (*Barrett v. Mutual Life Ins. Co.*, 85 S. W. 749, 27 Ky. Law Rep. 586).

So an action at law may be maintained for the paid-up insurance at the death of the insured if the demand therefor was made within the time that the rights of the parties were fixed, notwithstanding no paid-up policy was in fact issued (*Lenon v. Mutual Life Ins. Co.*, 98 S. W. 117, 80 Ark. 563, 8 L. R. A. [N. S.] 193, 10 Ann. Cas. 467).

So, where an insurance policy entitled plaintiffs to a paid-up policy after three years, and a demand was made in proper time and not complied with, plaintiffs were entitled to damages in the amount of the cash value of such paid-up policy (*Moore v. Life & Annuity Ass'n*, 148 Pac. 981, 95 Kan. 591).

Where insured elected to take a paid-up policy instead of accepting the surrender value, the policy, being subject to indebtedness, the indebtedness should be deducted from the surrender value in computing the amount of paid-up policy, and not from the paid-up policy (*Federal Life Ins. Co. v. Warren*, 181 S. W. 331, 167 Ky. 740).

A similar result was reached under a Massachusetts statute (St. 1887, c. 214, § 76) made part of life policy, in *Cotnam v. Massachusetts Mut. Life Ins. Co.*, of Springfield, Mass. (Iowa) 162 N. W. 786.

Where the test of the cost of a substitute is applied in measuring the damages for wrongful refusal to issue a paid-up benefit certificate, reference must be had to the cost of a precisely similar paid-up certificate in the same kind of association (*Bass v. Life & Annuity Ass'n*, 96 Kan. 205, 150 Pac. 588, judgment affirmed on rehearing 96 Kan. 398, 151 Pac. 1117).

In *Taylor v. New York Life Ins. Co.*, 90 N. E. 964, 197 N. Y. 324, reversing 115 N. Y. Supp. 1146, 131 App. Div. 922, under Laws N. Y. 1892, c. 690, § 88, it was held that the word "indebtedness," used in the phrase "provided there is no indebtedness against the policy" appearing in the table guaranteeing the continuance of the policy, included any indebtedness against the insured in favor of the insurer, the same as when used in the statute, and that the time the plaintiff's testator was entitled to have the policy continued was to be determined by the amount of premiums he had paid, less the amount of a premium note; and, since the time for which

this sum would continue the policy had expired before his death, plaintiff was not entitled to the full amount of the policy, but only the amount of paid-up insurance to which he was entitled under the terms of the policy.

Where an insurance policy issued under the laws of New York specifies the method of determining the amount of paid-up insurance which the insured will be entitled to in the event of his allowing the policy to lapse, statements made by the company's agent to insured will not entitle him to a policy for a larger amount (*United States Life Ins. Co. of New York v. Wood*, 107 S. W. 1193, 32 Ky. Law Rep. 1120).

In *Stark v. John Hancock Mut. Life Ins. Co. of Boston*, Mass., 159 S. W. 758, 176 Mo. App. 574, under policy providing for deduction of indebtedness and further providing for paid-up insurance on default, there being then no existing indebtedness "as aforesaid," it was held that an indebtedness did not defeat the right to paid-up insurance, but was merely to be deducted from the amount payable.

In *Jefferson v. New York Life Ins. Co.*, 152 S. W. 780, 151 Ky. 609, it was held that the term "dividend addition" means something added to the policy in the form of paid-up insurance, and does not mean unapportioned assets or surplus.

In *Du Brutz v. Bank of Visalia*, 87 Pac. 467, 4 Cal. App. 201, transfer of cause denied 87 Pac. 469, 4 Cal. App. 201, the insured and the beneficiary of a life policy providing for the issuance of a paid-up policy on nonpayment of premiums assigned it as collateral. The assignment transferred "all rights" under the policy and all benefits "accrued or to accrue" by virtue of its terms and covenants, and authorized the assignee to "receive" and "collect" any money "to become due" thereunder. It was held to give the assignee power to demand and receive a paid-up policy, where insured paid neither the debt nor the premiums, and to receive any benefits accruing thereunder.

In *Burke v. Prudential Ins. Co. of America*, 221 Mass. 253, 108 N. E. 1069, Ann. Cas. 1917E, 641, father and mother of minor, as guardians by nature, were held not entitled to consent to change of policy on his life to a paid-up policy.

In *Danner v. Equitable Life Assur. Society of United States*, 141 N. Y. Supp. 442, 156 App. Div. 562, under Laws 1879, c. 347, a ton-tine life insurance policy, and the application therefor, insured was held not entitled on a default in the payment of premiums during

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the tontine period to a paid-up policy for the amount of the accumulated reserve.

In *Penn. Mut. Life Ins. Co. v. Barnett's Adm'r*, 124 Ky. 266, 96 S. W. 1120, 29 Ky. Law Rep. 1234, it was held that on settlement of the policy, which should be at the time of its lapse, insured had the right under the terms of the policy to a paid-up policy for twelve-twentieths of the original policy, and the insurer had no right to deduct from the amount with which a paid-up policy should be bought, 25 per cent. of the reserve, and enough to continue the original policy till the note was due and interest thereafter to accrue, in addition to the principal of the note and the interest thereon to date.

2417-2422. (1) Same—Compliance with conditions

2417 (i). If an insurance company specifies a certain period for the surrender of a policy after default in order to obtain a paid-up policy for a proportionate amount, time is not of the essence of the contract.

Ingersoll v. Mutual Life Ins. Co. of New York, 156 Ill. App. 568; *Equitable Life Assur. Society of United States v. Golson*, 48 South. 1084, 159 Ala. 508; *Northwestern Mut. Life Ins. Co. v. Barbour*, 13 Ky. Law Rep. 205; *Lenon v. Mutual Life Ins. Co.*, 98 S. W. 117, 80 Ark. 563, 8 L. R. A. (N. S.) 193, 10 Ann. Cas. 467.

In Kentucky it is held that a demand and surrender within five years from the date of default are made within a reasonable time.

Ætna Life Ins. Co. v. Sugg, 86 S. W. 967, 27 Ky. Law Rep. 846, 120 Ky. 449; *Equitable Life Assur. Society of United States v. Amos*, 140 S. W. 172, 145 Ky. 167; *United States Life Ins. Co. of New York v. Wood*, 107 S. W. 1193, 32 Ky. Law Rep. 1120; *Wilson v. Washington Life Ins. Co. of New York*, 108 S. W. 339, 31 Ky. Law Rep. 717.

In other cases, however, it has been held that, where a life policy provided for the issuance of a paid-up policy on default in the payment of a premium, a provision that no such policy would be issued and that premiums paid should be forfeited in case the policy should not be returned receipted within a certain time after default was valid.

Blume v. Pittsburgh Life & Trust Co., 183 Ill. App. 295, judgment affirmed *Same v. Pittsburg Life & Trust Co.*, 104 N. E. 1031, 263 Ill. 160, 51 L. R. A. (N. S.) 1044, Ann. Cas. 1915C, 505; *Collman v. Equitable Life Assur. Soc. of United States*, 110 N. W. 444, 133 Iowa, 177, 8 L. R. A. (N. S.) 1019; *Cady v. Travelers' Ins. Co.*, 142

N. W. 107, 93 Neb. 634; *McCormack v. Security Mut. Life Ins. Co.*, 116 N. E. 74, 220 N. Y. 447.

So, in *Hatcher v. Equitable Life Assur. Society*, 68 S. E. 581, 134 Ga. 652, it was held that, where a life policy provided that after three payments had been made insured might, within six months after default, surrender the policy and receive a paid-up policy for an amount to be fixed according to data provided for in the policy, and insured defaulted in the payment of the annual premium due in 1893, and did not surrender or offer to surrender the policy according to the terms thereof, the beneficiaries could not recover upon the policy after insured's death in 1907, though, at the time of the lapse of the policy it had been lost or stolen; no effort having been made to have another policy issued to insured, nor a copy of the policy established, which he might surrender for cancellation in accordance with the provisions thereof.

So, in *Tyson v. Equitable Life Assur. Soc. of United States*, 87 S. E. 1055, 144 Ga. 729, it was held that, under a life policy giving insured in case of default option within 30 days to surrender policy and receive paid-up term policy for full amount, the option is not exercisable after 30 days, notwithstanding insanity of insured during that time.

In *Cady v. Travelers' Ins. Co.*, 142 N. W. 107, 93 Neb. 634, it was held that a notice sent by an agent of a life insurance company that the annual premium on insured's policy is past due, with a request for payment, did not change the term of the contract as to the date of its conversion into a paid-up policy of term insurance.

In *Frye v. Equitable Life Assur. Society of the United States*, 89 Atl. 57, 111 Me. 287, failure of insured to return the policy as required in case of default in payment of premiums was held to destroy his rights in the absence of a waiver or estoppel. It was also held that the act of a life insurance agent in informing a holder of a life policy that he was entitled to as many twentieths as he had paid premiums without any other policy was a waiver of the stipulation in the policy for its return to insurer as a condition precedent to insured's exercise of his rights under the policy.

2422-2423. (j) Same—Action to enforce rights

2422 (j). In *Lenon v. Mut. L. I. Co.*, 98 S. W. 117, 80 Ark. 563, 8 L. R. A. (N. S.) 193, 10 Ann. Cas. 467, it was held that, where insured was entitled to the issuance of a paid-up policy on forfeiture of his insurance for nonpayment of premiums, he was entitled to maintain

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a suit in equity to compel specific performance of the original contract by the issuance of such paid-up policy, but this was important only to afford evidence of his rights.

In *Equitable Life Assur. Society of United States v. Amos*, 140 S. W. 172, 145 Ky. 167, it was held that suit to enforce right to a paid-up life policy on default in paying premiums must be brought within 15 years from the time demand is properly made.

2423-2424. (k) Right to cash surrender value

2423 (k). Where a policy of life insurance provides that it shall have a surrender value on specified conditions, a cause of action to recover such value does not exist in advance of such performance (*Hilliard v. Wisconsin Life Ins. Co.*, 117 N. W. 999, 137 Wis. 208).

In *Equitable Life Assur. Society v. Cosby* (Ky.) 126 S. W. 142, it was held that the insured or his beneficiary were entitled to the cash surrender value of the policy less the amount due on a note, and in an action on the policy by the beneficiary, after the death of the insured, where the only evidence of the cash surrender value of the policy was that of defendant that it was equal to the amount of the note and interest, defendant was entitled to a directed verdict.

In *Mutual Life Ins. Co. of Kentucky v. Twyman*, 122 Ky. 513, 97 S. W. 391, 30 Ky. Law Rep. 90, 121 Am. St. Rep. 471, under Ky. St. 1903, § 653, it was held that where insured in a paid-up policy assigned it to insurer as collateral, and, on his failure to pay the debt secured, the insurer resorted to equity to enforce its rights based on the surrender value, the same should be determined under the statutory plan for estimating the value of the reserve, any dividends in which the policy was entitled to participate being also considered.

In *Metropolitan Life Ins. Co. v. Clay*, 164 S. W. 968, 158 Ky. 192, it was held that under the Kentucky Nonforfeiture Act of April 5, 1893, providing that industrial insurance on which the weekly premiums are not more than 50 cents shall have a cash surrender value after payment of two full premiums, a demand for the cash surrender value is governed by the five-year statute of limitations; the act fixing no time for demand. In the same case it was stated that under the Kentucky Nonforfeiture Act of July 1, 1893, providing that policies of industrial insurance should not be forfeited after payment of five premiums, and requiring demand for paid-up insurance to be made within eight weeks, the time for the demand for the cash surrender value, not being fixed by the act, will be fixed at eight weeks by analogy to paid-up insurance.

In *New York Life Ins. Co. v. Hardison*, 85 N. E. 410, 199 Mass. 190, 127 Am. St. Rep. 478, a statute (St. 1907, p. 897, c. 576, § 75, subsec. 8) provided that each life insurance policy should contain a table showing in figures the loan values, if any, and the options available under the policy each year, on default of premiums. Petitioners' proposed policy form showed the "cash surrender value" accurately, the column being headed with such words, and just before that table, under the head "Loans," in large type, was a statement that at any time while the policy was in force the company would loan up to the limit secured by the cash surrender value, etc. It was held that such table, with the accompanying statement, sufficiently showed the actual loan values of the policies.

In *Hill v. Bankers' Life Ins. Co. of City of New York*, 112 N. Y. Supp. 120, it was held that, since insurer's letter was a wrongful refusal to pay any cash on a surrender of the policy on the ground that it had no cash value, insured was relieved from the duty of making an absolute offer of surrender and demand for payment, and his right to demand the cash surrender value could not be defeated by a failure to pay the annual premium which later fell due.

In *Armstrong v. Equitable Life Assur. Society of the United States*, 80 S. E. 694, 14 Ga. App. 353, it was held that a letter agreeing that the insurer will pay a certain sum on surrender of the policy is not a valid contract, where an insurance policy contains no provision for a cash surrender value when written after lapse of the policy and without consideration.

In *Palmer v. Mutual Life Ins. Co. of New York*, 130 N. W. 250, 114 Minn. 1, Ann. Cas. 1912B, 957, it was held that, in an action on a life policy, allegations of the complaint that the agreed surrender value of the policy was \$1,445, while the actual value thereof was \$2,278.70, so that an agreement under which the insured pledged the policy with insurer as security for a loan, which provided that upon insured's default of payment thereof the policy might be canceled by the insurer, applying the surrender value to payment of the loan, and paying the balance, if any, to insured, was usurious, and an attempt to impose a penalty for nonpayment of the debt, and therefore unlawful, presented a question of fact.

In *Mutual Life Ins. Co. of New York v. Cameron*, 56 South. 782, 100 Miss. 604, the surrender clause of a 20-year distribution policy provided that the policy might be surrendered at the end of 20 years, or of any subsequent quinquennial dividend period, and the reserve might be withdrawn, and that no cash value would be paid

for surrender at any other time. Another clause provided that only policies in force at the end of the 20-year term should share in the surplus, and that no distribution should be made at any previous time. Another clause provided that if the policy should become void for nonpayment of premiums all payments previously made should be forfeited, etc. The policy lapsed for nonpayment of the sixth annual premium, and no application was made for a paid-up policy within the required time. It was held, in a suit by insured at the end of the 20-year period, that he was not entitled to a distributive share of the surplus, nor to any reserve. It was said in the same case that Laws N. Y. 1879, c. 347, § 2, providing for the payment of reserve upon "endowment" policies, does not apply to 20-year distribution policies.

6. PLEADING AND PRACTICE IN RELATION TO FORFEITURE FOR NONPAYMENT OF PREMIUMS OR ASSESSMENTS

2425-2427. (a) Pleading

2425 (a). Plaintiff, in an action on a beneficiary certificate, is not required to plead that all assessments and dues had been paid; that being a matter of defense.

Rosenthal v. Supreme Ruling of Fraternal Mystic Circle, 152 N. W. 404, 129 Minn. 214; *Kinney v. Brotherhood of American Yeomen*, 106 N. W. 44, 15 N. D. 21.

A contrary view was taken in *Noble v. Southern States Mut. Life Ins. Co.*, 162 S. W. 528, 157 Ky. 46.

In *Boyd v. Fidelity Mut. Life Ins. Co.*, 41 South. 268, 88 Miss. 562, a declaration in an action on a policy of life insurance, alleging the defendant's agent duly authorized by defendant so to do, solicited insured to take out a policy, offering as a special inducement the fact that defendant allowed 30 days of grace in the payment of premiums, and that insured took out the policy on the faith of such representations, and further alleging the payment of the first annual premium, and the death of insured after the expiration of a year, but within 13 months from the date of such payment, was not demurrable on the ground that the second annual premium had not been paid when due, in view of the averments that defendant authorized the representations to be made and that the policy was taken out on the faith thereof.

In *Battin v. Northwestern Mut. Life Ins. Co.*, 143 Fed. 473, 74 C. A. 459, it was held that in an action by the beneficiary to recover

the full amount of a life insurance policy, in which it was conclusively proved that the policy had lapsed prior to the death of the insured, plaintiff was not entitled to recover as an alternative the paid-up value of the policy, to which she would have been entitled, but which she had never consented to accept and did not ask for in her pleading.

In *Caywood v. Supreme Lodge of Knights and Ladies of Honor*, 86 N. E. 482, 171 Ind. 410, 23 L. R. A. (N. S.) 304, 131 Am. St. Rep. 253, 17 Ann. Cas. 503, it was held that in an action on a mutual benefit certificate, the defense being nonpayment of an assessment, and plaintiff claiming that the company owed insured money for services which it should have applied to the assessment, the mere allegation that the company owed for the services, and that it was its duty to apply the money to payment of the assessment, was insufficient; it being necessary to allege positively the facts from which such duty arose.

In *Supreme Tent, Knights of Maccabees of the World, v. Fisher*, 90 N. E. 1044, 45 Ind. App. 419, it was held that where a complaint alleged that defendant denied liability and refused and still refuses to furnish blanks for proof of death, and insured and plaintiff performed all conditions on their part, etc., the complaint was not defective on the theory that plaintiff was bound to furnish proofs of death, before suit was brought, regardless of defendant's refusal to furnish blanks therefor.

Failure of a member of a mutual benefit society to pay regular monthly assessments cannot be relied on as a ground of forfeiture in an action on the certificate, unless specially pleaded.

Kinney v. Brotherhood of American Yeomen, 106 N. W. 44, 15 N. D. 21; *Kidder v. Supreme Commandery United Order of Golden Cross*, 78 N. E. 469, 192 Mass. 326.

Where pleaded, such facts state a good defense (*Sovereign Camp Woodmen of the World v. Ogden*, 107 N. W. 860, 76 Neb. 643).

In an action on a benefit certificate, a defense that an assessment authorized by the by-laws of the order had not been paid cannot be made without setting up at least the substance of the laws, and a mere reference to the "laws of defendant" is insufficient (*Johnson v. Sovereign Camp, Woodmen of the World*, 95 S. W. 951, 119 Mo. App. 98).

So a violation of an article of a fraternal insurance order, regulating reinstatement of a suspended member, not pleaded in an action

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on the benefit certificate, is not available as a defense (*McRaith v. Grand Lodge, A. O. U. W.*, 126 N. W. 321, 149 Iowa, 148).

In *Zahm v. Royal Fraternal Union of St. Louis*, 133 S. W. 374, 154 Mo. App. 70, it was held that where, in an action on an insurance certificate, defendant denied liability except for \$100, on the theory that insured had been suspended for nonpayment of an assessment in time, a reply containing first a general denial, and then alleging that insured was never in default in the payment of his dues nor was other than in good standing in the order, and setting up matters of estoppel, was not subject to a general demurrer.

In *Equitable Life Assur. Soc. of United States v. Perkins*, 80 N. E. 682, 41 Ind. App. 183, though a life insurance policy provided that at its maturity, in the absence of notice, within a specified time by the holder electing to withdraw in cash his share of the accumulated reserve the sum should be used to purchase an annuity, where the company was sued for the surrender value and denied liability on the specific ground that the policy was forfeited before maturity, it could not complain that such notice had not been given.

2427-2428. (b) Issues, proof, and variance

2427 (b). In *Taylor v. Modern Woodmen of America*, 83 Pac. 1099, 72 Kan. 443, 5 L. R. A. (N. S.) 283, it was held that where, in an action on a benefit certificate issued by a fraternal insurance company, the answer sets up as a defense a ruling of the clerk of the local camp refusing an assessment on certain grounds, and that no appeal had been taken under the by-laws, and the evidence shows such refusal on the ground that the beneficiary had been suspended for a different reason, there is a fatal variance between the answer and proof.

In *Crook v. New York Life Ins. Co.*, 75 Atl. 388, 112 Md. 268, it was held that where, in an action on a life policy, the sole defense was that it had lapsed for nonpayment of a premium, the application for insurance, the report of the medical examiner, and the cause of insured's death, together with evidence defining a substandard policy and proof of why insurer refused to issue to insured a standard policy, and that insurer knew the condition of insured, were properly excluded.

In *Shoemaker v. Commercial Union Assur. Co., Limited*, of London, 106 N. W. 316, 75 Neb. 587, it was held that where plaintiff pleads payment of premium on an insurance policy, and the court charges that such payment must be established to entitle her to a

verdict, the requirement is not satisfied by evidence of a waiver or postponement of the time of payment.

2428-2430. (c) Presumptions and burden of proof

2428 (c). In an action on a policy or mutual benefit certificate, the issue of the policy or certificate of insurance and the insured's death being shown by plaintiff, the burden is on the company to show nonpayment of premiums or dues or other matters going to avoid the policy.

Johnson v. Hartford Life Ins. Co., 148 S. W. 681, 166 Mo. App. 261; *King v. Hartford Life & Annuity Ins. Co.*, 114 S. W. 63, 133 Mo. App. 612; *Watkins v. Brotherhood of American Yeomen*, 176 S. W. 516, 188 Mo. App. 626; *Keeton v. National Union*, 165 S. W. 1107, 178 Mo. App. 301; *Harris v. Security Life Ins. Co. of America*, 154 S. W. 68, 248 Mo. 304, Ann. Cas. 1914O, 648; *Gruwell v. National Council of Knights and Ladies of Security*, 104 S. W. 884, 126 Mo. App. 496; *Burchard v. Western Commercial Travelers' Ass'n*, 123 S. W. 973, 139 Mo. App. 606; *Haywood v. Grand Lodge of Texas, K. P. (Tex. Civ. App.)* 138 S. W. 1194; *Wilkie v. National Council J. O. U. A. M. of United States of North America*, 61 S. E. 580, 147 N. C. 637; *Grand Lodge K. P. v. Whitehead*, 112 S. W. 190, 87 Ark. 115; *James v. Fraternity of Home Protectors*, 54 Pa. Super. Ct. 375; *Patton v. Women of Woodcraft*, 131 Pac. 521, 65 Or. 33; *Globe Mut. Life Ins. Ass'n v. March*, 118 Ill. App. 261; *McLaughlin v. National Protective Legion*, 184 Ill. App. 597; *Sovereign Camp, Woodmen of the World v. Cox*, 78 N. E. 683, 40 Ind. App. 266, Id., 80 N. E. 850, 40 Ind. App. 266, reversing (Ind. App.) 76 N. E. 888; *Sleight v. Supreme Council of Mystic Tollers*, 107 N. W. 183, 133 Iowa, 379; *Van Etten v. Grand Lodge, A. O. U. W.*, 60 Atl. 210, 72 N. J. Law, 61; *Kidder v. Supreme Commandery United Order of Golden Cross*, 78 N. E. 469, 192 Mass. 326; *Jones v. New York Life Ins. Co.*, 122 Pac. 702, 32 Okl. 339; *Wajczellunas v. St. Peter's Lithuanian Society*, 126 N. Y. Supp. 884, 141 App. Div. 852; *Liesny v. Metropolitan Life Ins. Co.*, 131 N. Y. Supp. 1087, 147 App. Div. 253; *Strand v. Loyal Americans of the Republic*, 142 N. W. 10, 122 Minn. 118; *Ibs v. Hartford Life Ins. Co.*, 137 N. W. 289, 119 Minn. 113; *McNaughton v. Des Moines Life Ins. Co.*, 122 N. W. 764, 140 Wis. 214; *State Division, Lone Star Ins. Union, v. Blassengame (Tex. Civ. App.)* 162 S. W. 6; *Stack v. Williams*, 166 App. Div. 190, 151 N. Y. Supp. 185; *Victoria v. Musical Mut. Protective Ass'n (Sup.)* 162 N. Y. Supp. 652; *Barber v. Hartford Life Ins. Co.*, 187 S. W. 867, 874, 269 Mo. 21; *Johnson v. Hartford Life Ins. Co.*, 197 S. W. 132, 271 Mo. 562; *Rousseau v. Brotherhood of American Yeomen*, 152 N. W. 939, 186 Mich. 101.

In *Supreme Lodge of Pathfinder v. Johnson (Tex. Civ. App.)* 168 S. W. 1010, however, it was held that a beneficiary, suing on a

fraternal benefit certificate, has the burden of proving that the certificate subject to forfeiture for nonpayment of dues was in force at the death of the member.

A beneficiary, who, in an action on a benefit certificate, relies on performance by the member of a condition subsequent, resulting in his reinstatement after his certificate has been forfeited by nonpayment of dues, has the burden of proving performance, where the answer denies that the member was reinstated.

Brotherhood of Ry. Trainmen v. Dee, 111 S. W. 396, 101 Tex. 597, reversing (Tex. Civ. App.) 108 S. W. 492; *Rome Industrial Ins. Co. v. Eldson*, 82 S. E. 641, 142 Ga. 253; *Woodmen of the World v. Jackson*, 97 S. W. 673, 80 Ark. 419; *Kennedy v. Grand Fraternity*, 92 Pac. 971, 36 Mont. 325, 25 L. R. A. (N. S.) 78.

In *Metropolitan Life Ins. Co. v. Clayton's Adm'x*, 144 S. W. 75, 147 Ky. 358, the burden of proof was held to be upon an insurance company to show that the insured authorized it to apply money in its hands upon the premiums of policies other than his own.

2430-2432. (d) Admissibility of evidence

2430 (d). In *King v. Hartford Life & Annuity Ins. Co.*, 114 S. W. 63, 133 Mo. App. 612, it was held that where, in an action on a life policy, plaintiff claimed that an alleged forfeiture for nonpayment of an assessment was illegal, because the assessment was unnecessary owing to the existence of a trust fund sufficient to pay assessments, a report filed by defendant with the superintendent of insurance pursuant to Rev. St. 1899, § 7880 (Ann. St. 1906, p. 3740), was admissible to show defendant's financial condition.

In *Easter v. Brotherhood of American Yeomen*, 135 S. W. 964, 154 Mo. App. 456, it was held that, where an insurance association was organized as a fraternal insurance company under the laws of Iowa, the laws of Iowa were admissible to show what kind of an insurance company it was, even though the insurance company had alleged that it was a fraternal association and the court had held it to be an assessment association, for the pleadings should be interpreted in accordance with the facts alleged and not with the pleader's conclusions of law.

In *Modern Brotherhood of America v. Chandler* (Tex. Civ. App.) 146 S. W. 626, it was held that in an action on a benefit certificate, in which the issue was as to whether female insured died of an abdominal disease evidence that about 25 per cent. of the women of the United States have trouble down in the abdominal front held

inadmissible. It was said in the same case that in an action on a mutual benefit certificate, evidence of insured's husband that up to the time of her last illness insured did all her household work was admissible as bearing on the health of deceased at the time she was reinstated as a member, and before she was taken sick.

In *Duffy v. Fidelity Mut. Life Ins. Co.*, 55 S. E. 79, 142 N. C. 103, 7 L. R. A. (N. S.) 238; *Id.*, 59 S. E. 1131, 143 N. C. 697, it was held that, where a by-law of an assessment insurance company made a certificate of the treasurer or bookkeeper of the mailing of notice of an assessment conclusive as to the mailing, a certificate made by the treasurer to the effect that there was attached thereto a correct transcript of the company's records showing the mailing of the notice, being the affidavit of the mailing clerk, and a paper referred to therein, was inadmissible as hearsay.

So, in an action on a certificate of membership in a mutual benefit association, where it appeared that no notice of assessment calls were sent except to an old address, a letter from the officer whose duty it was to give notice, showing that he knew the member's regular address, was admissible in evidence (*Bange v. Supreme Council Legion of Honor of Missouri*, 105 S. W. 1092, 128 Mo. App. 461).

However, where the question was whether insured had received timely notice of assessments, evidence that other members had received notices mailed at the time plaintiff's notice was alleged to have been mailed was inadmissible (*State Division, Lone Star Ins. Union, v. Blassengame* [Tex. Civ. App.] 162 S. W. 6).

Where, in an action on a life policy, the issue was whether the insurer through its general agent had extended the time for the payment of the premium, it was competent for the agent to testify that insured had not solicited credit for the premium (*Cauthen v. Hartford Life Ins. Co.*, 61 S. E. 428, 80 S. C. 264). So, in an action on the policy, it was proper to permit plaintiff to be asked whether he had any talk with any one about reinstating the policy, as it was proper to show, after the policy had ceased to exist, whether it had been revived by the consent or permission of the insured (*Osterhoudt v. Prudential Ins. Co. of America*, 120 N. Y. Supp. 641, 136 App. Div. 123). But an application by insured for reinstatement was inadmissible to prove insured's suspension in an action by the beneficiary under the policy (*Keeton v. National Union*, 165 S. W. 1107, 178 Mo. App. 301).

The admissibility of evidence as to payment or tender was considered in the following cases: *National Life & Accident Ins. Co. v. Lokey*,

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52 South. 45, 166 Ala. 174; *Woodmen of the World v. Hall*, 148 S. W. 526, 104 Ark. 538, 41 L. R. A. (N. S.) 517; *Rome Industrial Ins. Co. v. Eldson*, 82 S. E. 641, 142 Ga. 253; *Jones v. Supreme Lodge Knights of Honor*, 86 N. E. 191, 236 Ill. 113, 127 Am. St. Rep. 277; *Supreme Tribe of Ben Hur v. Cosgrove*, 169 S. W. 999, 160 Ky. 595, 161 Ky. 484; *McNicholas v. Prudential Ins. Co.*, 77 N. E. 756, 191 Mass. 304; *Eames v. New York Life Ins. Co.*, 114 S. W. 85, 134 Mo. App. 331; *Hotchkiss v. Supreme Lodge K. P.*, 165 S. W. 1120, 178 Mo. App. 137; *Sexton v. Greensboro Life Ins. Co.*, 76 S. E. 535, 160 N. C. 597; *Kinney v. Brotherhood of American Yeomen*, 106 N. W. 44, 15 N. D. 21; *United Moderns v. Pistole*, 86 S. W. 377, 38 Tex. Civ. App. 422; *Knights of Modern Maccabees v. Gillis*, 125 S. W. 338, 59 Tex. Civ. App. 109; *Equitable Life Assur. Society of United States v. Ellis*, 152 S. W. 625, 105 Tex. 526, overruling motion for rehearing 147 S. W. 1152, 105 Tex. 526.

Resolution by local council of benefit society concerning death of member is admissible to show that he was in good standing. *National Council Junior Order United American Mechanics of the United States v. Thomas*, 173 S. W. 813, 163 Ky. 364.

2432-2433. (e) Weight and sufficiency of evidence

2432 (e). In an action on an insurance policy, under Rev. St. 1899, § 7897 (Ann. St. 1906, p. 3752), providing for nonforfeiture because of lapse, etc., the evidence of an actuary as to the net value of a policy, based upon computations, founded on an erroneous construction of the statute's requirements as to the elements of the computation, was wholly worthless (*Rose v. Franklin Life Ins. Co.*, 132 S. W. 613, 153 Mo. App. 90).

Under terms of policy, insured's demand for its cash surrender value was held sufficient in *Majestic Life Assur. Co. v. Winfield*, 108 N. E. 249, 58 Ind. App. 402.

In *Ibs v. Hartford Life Ins. Co.*, 137 N. W. 289, 119 Minn. 113, in an action on an insurance policy, evidence was held to show a prima facie valid excuse for an apparent default in the payment of dues and assessments.

In *McNicholas v. Prudential Ins. Co. of America*, 82 N. E. 692, 196 Mass. 565, in an action on a life policy requiring a weekly payment of premiums and stipulating that payments of premiums, to be recognized by the company, must be entered at the time of payment in the premium receipt book, evidence was held to authorize a finding of a sufficient explanation for the failure of all the payments to appear on the book, authorizing a recovery.

Sufficiency of evidence as to payment or tender was considered in *Johnson v. Sovereign Camp Woodmen of the World*, 147 S. W.

510, 163 Mo. App. 728; *Majestic Life Assur. Co. v. Winfield*, 108 N. E. 249, 58 Ind. App. 402; *Mulherin v. Bankers' Life Ass'n*, 144 N. W. 1000, 163 Iowa, 740; *Jenkins v. Ancient Order of United Workmen of Kansas*, 144 Pac. 223, 93 Kan. 324; *Bennett v. Sovereign Camp, Woodmen of the World* (Tex. Civ. App.) 168 S. W. 1023; *Lathrop v. Modern Woodmen of America*, 126 Pac. 1002, 63 Or. 193; *Empire Life Ins. Co. v. Wier*, 68 S. E. 1035, 135 Ga. 130; *Reppond v. National Life Ins. Co.*, 101 S. W. 786, 100 Tex. 519, 11 L. R. A. (N. S.) 981, 15 Ann. Cas. 618, reversing (Tex. Civ. App.) 96 S. W. 778; *Burridge v. New York Life Ins. Co.*, 109 S. W. 560, 211 Mo. 158; *Driver v. Planters' Mut. Ins. Ass'n*, 93 S. W. 752, 78 Ark. 127; *Manhattan Life Ins. Co. v. Kephart*, 102 S. W. 882, 31 Ky. Law Rep. 545; *Sovereign Camp, Woodmen of the World, v. Cox* (Ind. App.) 75 N. E. 290; *Sovereign Camp, Woodmen of the World, v. Cox*, 78 N. E. 683, 40 Ind. App. 266, reversing (App.) 76 N. E. 888; *Hanson v. Aetna Life Ins. Co.*, 113 N. W. 114, 78 Neb. 421; *Arrison v. Supreme Council of Mystic Tollers*, 105 N. W. 580, 129 Iowa, 303; *Supreme Tent Knights of the Maccabees of the World v. Fisher*, 90 N. E. 1044, 45 Ind. App. 419; *Cigar Makers' International Union of America v. Huecker*, 123 Ill. App. 336; *Woodmen of the World v. Jackson*, 97 S. W. 873, 80 Ark. 419; *Van Etten v. Grand Lodge A. O. U. W.*, 60 Atl. 210, 72 N. J. Law, 61; *Sterling v. Head Camp, Pacific Jurisdiction*, 80 Pac. 375, 28 Utah, 505, rehearing denied 80 Pac. 1110, 28 Utah, 526; *Grand Lodge A. O. U. W. v. Taylor*, 99 Pac. 570, 44 Colo. 373; *Grand Fraternity v. Mulkey*, 130 S. W. 242, 185 S. W. 582, 62 Tex. Civ. App. 147; *Asserin v. Modern Brotherhood of America*, 133 N. W. 579, 147 Wis. 520; *Royal Circle of Friends of the World v. Paine*, 146 S. W. 142, 103 Ark. 171; *Johnson v. Bankers' Life Co.* (Mo. App.) 193 S. W. 993.

Sufficiency of evidence to show forfeiture was considered in *Wolarsky v. New York Life Ins. Co.*, 104 N. Y. Supp. 1047, 120 App. Div. 99; *Sexton v. Greensboro Life Ins. Co.*, 76 S. E. 535, 160 N. C. 597; *United States Benev. Soc. v. Watson*, 84 N. E. 29, 41 Ind. App. 452; *Knights of the Modern Maccabees v. Gillis* (Tex. Civ. App.) 144 S. W. 713; *Weston v. State Mut. Life Assur. Co.*, 137 Ill. App. 319, judgment affirmed *Weston v. State Mut. Life Assur. Soc.*, 84 N. E. 1073, 234 Ill. 492; *Dobson v. Triple Tie Ben. Ass'n*, 129 Pac. 1173, 88 Kan. 705; *Mills v. National Life Ins. Co.*, 189 S. W. 691, 136 Tenn. 350.

Sufficiency of evidence, as to extension of time for payment of premiums was considered in *Carr v. Prudential Ins. Co.*, 101 N. Y. Supp. 158, 115 App. Div. 755; *Cornell v. Travelers' Ins. Co. of Hartford, Conn.*, 104 N. Y. Supp. 999, 120 App. Div. 459; *Equitable Life Assur. Society of United States v. Ellis* (Tex. Civ. App.) 137 S. W. 184; *Rogers v. American Nat. Ins. Co.*, 89 S. E. 700, 145 Ga. 570; *Wichita Southern Life Ins. Co. v. Roberts* (Tex. Civ. App.) 186 S. W. 411.

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Sufficiency of evidence of necessity of levy of assessment was considered in *Eaton v. Western Life Indemnity Co.*, 185 Ill. App. 217; *Ibs v. Hartford Life Ins. Co.*, 141 N. W. 289, 121 Minn. 310, Ann. Cas. 1914C, 798; *King v. Hartford Life & Annuity Ins. Co.*, 114 S. W. 63, 133 Mo. App. 612.

Sufficiency of evidence as to health of insured was considered in *Howton v. Sovereign Camp Woodmen of the World*, 172 S. W. 687, 162 Ky. 432; *Duke v. Eminent Household of Columbian Woodmen*, 133 S. W. 1028, 97 Ark. 290; *Kennedy v. Grand Fraternity*, 92 Pac. 971, 36 Mont. 325, 25 L. R. A. (N. S.) 78.

Sufficiency of evidence as to notice of assessments or balance due was considered in *State Division, Lone Star Ins. Union, v. Blassengame* (Tex. Civ. App.) 162 S. W. 6; *Murphy v. Lafayette Mut. Life Ins. Co.*, 83 S. E. 461, 167 N. C. 334; *Mutual Life Industrial Ass'n of Georgia v. Scott*, 54 South. 182, 170 Ala. 420.

Sufficiency of evidence to go to the jury was considered in *Lavin v. Grand Lodge A. O. U. W. of Missouri*, 86 S. W. 600, 112 Mo. App. 1; *Supreme Lodge K. P. v. Connelly*, 64 South. 362, 185 Ala. 301; *Royal Neighbors of America v. Laufman*, 164 S. W. 966, 158 Ky. 358; *National Council Junior Order American Mechanics of United States v. Thomas*, 173 S. W. 813, 163 Ky. 364; *Bohles v. Prudential Ins. Co. of America*, 84 N. J. Law, 315, 86 Atl. 438, affirming judgment 83 Atl. 904, 83 N. J. Law, 246; *Francis v. Prudential Ins. Co. of America*, 90 Atl. 205, 243 Pa. 380; *Rouleau v. Continental Life Ins. & Inv. Co.*, 144 Pac. 1096, 45 Utah, 234; *Wylie v. United States Health & Accident Ins. Co.*, 82 S. E. 402, 98 S. C. 273; *Lounsbury v. Knights of Maccabees of the World*, 112 N. Y. Supp. 921, 128 App. Div. 394, affirmed 93 N. E. 377, 199 N. Y. 573; *Squires v. Modern Brotherhood of America*, 135 Pac. 774, 68 Or. 336; *Illinois Life Ins. Co. v. Wortham* (Ky.) 119 S. W. 802; *Wortham v. Illinois Life Ins. Co.*, 107 S. W. 276, 32 Ky. Law Rep. 827; *Johnson v. Hartford Life Ins. Co.*, 148 S. W. 631, 166 Mo. App. 261; *Security Mut. Life Ins. Co. v. Kleutsch*, 169 Fed. 104, 95 C. C. A. 432; *Currence v. Sovereign Camp Woodmen of the World*, 78 S. E. 442, 95 S. C. 61; *Dominco v. Prudential Ins. Co. of America*, 49 Pa. Super. Ct. 156; *Fidelity Mut. Life Ins. Co. v. Click*, 124 S. W. 764, 93 Ark. 162; *Bange v. Supreme Council Legion of Honor of Missouri*, 105 S. W. 1092, 128 Mo. App. 461.

2433-2434. (f) Trial and review

2433 (f). Whether a notice of an assessment on mutual benefit certificates was mailed to the insured's regular address as required by the policy is for the jury.

Bange v. Supreme Council Legion of Honor of Missouri, 132 S. W. 276, 153 Mo. App. 154; *Howell v. John Hancock Mut. Life Ins. Co.*, 78 N. E. 1105, 186 N. Y. 556, affirming 95 N. Y. Supp. 87, 107 App. Div. 200.

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So, on the facts, is the question of whether there was a mailing of a notice, which Insurance Law, § 92 (Laws 1897, p. 92, c. 218, § 2), makes a prerequisite to forfeiture of a life policy (Howell v. John Hancock Mut. Life Ins. Co., 95 N. Y. Supp. 87, 107 App. Div. 200, affirmed 78 N. E. 1105, 186 N. Y. 556).

Where the evidence in an action on a benefit certificate was conflicting as to whether deceased was in arrears or had been legally suspended at the time of his death, the issue was properly left to the jury.

Grand Lodge, F. & A. M. of Texas, v. Dillard (Tex. Civ. App.) 162 S. W. 1173; *United Order of the Golden Cross v. Hooser*, 160 Ala. 334, 49 South. 354; *West v. National Casualty Co.*, 112 N. E. 115, 61 Ind. App. 479.

The question of the insured's regular address is for the jury (*Bange v. Supreme Council Legion of Honor of Missouri*, 161 S. W. 652, 179 Mo. App. 21).

So is the question whether it was intended that failure to pay premium notes should result in a forfeiture of the policy (*Clark v. Southeastern Life Ins. Co.*, 85 S. E. 407, 101 S. C. 249).

So is the question whether insured was in good health when he procured the reinstatement of the policy by paying an overdue premium (*Bracket v. Modern Brotherhood of America*, 157 S. W. 690, 154 Ky. 340, 45 L. R. A. [N. S.] 1144).

So is the question whether insured voluntarily allowed the policy to lapse, or whether that result was accomplished by the wrongful act of the insurer (*Balliett v. Metropolitan Life Ins. Co.*, 110 N. Y. Supp. 77, 125 App. Div. 705).

So is the question whether a remittance was received (*Ruder v. National Council, Knights and Ladies of Security*, 145 N. W. 118, 124 Minn. 431).

So is the question whether a draft was taken by the bank for the company or whether the bank itself discounted it and advanced the money, in view of the circumstances and relation between the bank and the insured (*Talbott v. Metropolitan Life Ins. Co.*, 142 Fed. 694, 74 C. C. A. 26).

So is the question whether an insurance company authorized its soliciting agent to accept a note payable to himself for the premium, and whether he was authorized to and did extend time for payment thereof, was for the jury (*Hutchins v. Globe Life Ins. Co.*, 190 S. W. 446, 126 Ark. 360).

Where a member of a fraternal benefit society was paying a very high assessment and it was increased very largely, the question whether such assessment was reasonable and necessary is one of fact (*Supreme Lodge Knights of Honor v. Bieler*, 105 N. E. 244, 58 Ind. App. 550).

Under Laws 1892, p. 1792, c. 690, § 92, making the mailing of a notice to insured a prerequisite to forfeiture of a life policy, and declaring that no policy shall be forfeited until 30 days after such notice, proof of payment of premiums is not essential to recovery on the policy (*Auspitz v. Equitable Life Assur. Society of United States*, 115 N. Y. Supp. 109, 62 Misc. Rep. 469).

In *District Grand Lodge No. 11, Endowment of Grand United Order of Odd Fellows, v. Pratt*, 132 S. W. 998, 96 Ark. 614, it was held that it is not a technical defense for a mutual benefit insurance association to insist that the policy is voided because of lapse in payment of dues, and hence an instruction, in a case where that defense was interposed, that technical defenses are not favored in actions on insurance policies, was misleading and improper, especially as the court did not define technical defenses.

Whether a non-suit should be granted was considered in *Spencer v. Travelers' Ins. Co.*, 86 S. W. 899, 112 Mo. App. 86; *Dolsen v. Phoenix Preferred Acc. Ins. Co.*, 115 N. W. 50, 151 Mich. 228; *Belrne v. Modern Nat. Reserve*, 111 P. 1032, 42 Mont. 332; *Carr v. Prudential Ins. Co.*, 101 N. Y. Supp. 158, 115 App. Div. 755.

Various other instructions were considered in *Continental Casualty Co. v. Wade* (Tex. Civ. App.) 99 S. W. 877; *Howell v. John Hancock Mut. Life Ins. Co.*, 95 N. Y. Supp. 87, 107 App. Div. 200, affirmed 78 N. E. 1105, 186 N. Y. 556; *Mutual Fire Ins. Co. v. Turner*, 79 S. E. 1067, 115 Va. 631; *Ballah v. Peoria Life Ass'n*, 159 Ill. App. 222; *Grand Fraternity v. Mulkey*, 130 S. W. 242, 185 S. W. 582, 62 Tex. Civ. App. 147.

XV. AVOIDANCE AND FORFEITURE IN GUARANTY AND INDEMNITY INSURANCE

1. AVOIDANCE OF CONTRACT FOR CONCEALMENT, MISREPRESENTATION, OR BREACH OF WARRANTY OR CONDITION PRECEDENT

2435-2437. (a) Fidelity insurance—Warranties and representations

2435 (a). Whether the answers made by the applicant for a policy of indemnity or insurance are warranties or mere representations depends on the character of the question and its answer, the opportunity of the insurer to guard against the representation in the light of its consequences, or whether it is material to the risk (*Poultry Producers' Union v. Williams*, 107 Pac. 1040, 58 Wash. 64, 137 Am. St. Rep. 1041). The statement is not a warranty where it is not a part of the bond, nor referred to in it (*Stapleton Nat. Bank v. United States Fidelity & Guaranty Co.*, 113 N. Y. Supp. 25, 60 Misc. Rep. 206, judgment reversed 131 App. Div. 157, 115 N. Y. Supp. 372). So a statement in an application for an indemnity policy is immaterial, in an action on another policy subsequently issued, and which made no reference to such application (*National Surety Co. v. Western Pac. Ry. Co.*, 200 Fed. 675, 119 C. C. A. 91).

Statements or declarations by the insured will be regarded as representations, and not warranties, unless the contract makes them so.

American Bonding & Trust Co. of Baltimore v. Burke, 85 Pac. 692, 38 Colo. 49; *Commercial Bank v. American Bonding Co.*, 187 S. W. 99, 194 Mo. App. 224; *Whinfield v. Massachusetts Bonding & Ins. Co.*, 154 N. W. 632, 162 Wis. 1.

In *Fidelity & Deposit Co. of Maryland v. Colorado Ice & Storage Co.*, 103 Pac. 383, 45 Colo. 443, it was held that where a policy indemnifying against default of an employé did not provide that his duties should be limited to certain lines, and should not thereafter be changed, the statement in the application for the policy that the employé was a collector and ticket distributor was a representation only, and not a guaranty that the employé should not be given additional duties.

So in *Fidelity & Deposit Co. of Maryland v. Guthrie Nat. Bank*, 87 Pac. 300, 17 Okl. 397, it was held that, where the president of a bank answers questions in writing at the request of the bonding

company as to the former conduct of employé, such questions and answers are representations and not warranties.

On the other hand, it has been held in several cases that written statements by a corporation accompanying an application for a bond guarantying the honesty of employés which statements relate to the past conduct of such employés, and enter into the contract and become the inducement in part for the issuing of the bond, are in the nature of warranties, and their falsity in any material particular will defeat recovery on the bond.

Sunderland Roofing & Supply Co. v. United States Fidelity & Guaranty Co., 122 N. W. 25, 84 Neb. 791; *Ætna Indemnity Co. v. Farmers' Nat. Bank of Boyertown, Pa.*, 169 Fed. 737, 95 C. C. A. 169; *Poultry Producers' Union v. Williams*, 107 Pac. 1040, 58 Wash. 64, 137 Am. St. Rep. 1041; *Livingston v. Fidelity & Deposit Co. of Maryland*, 81 N. E. 330, 76 Ohio St. 253.

In *Title Guaranty & Surety Co. v. Nichols*, 32 Sup. Ct. 475, 224 U. S. 346, 56 L. Ed. 795, affirming judgment 100 Pac. 825, 12 Ariz. 405, it was held that an official certificate made in view of renewal of a bank cashier's bond that his books and accounts have just been examined and found correct is not a warranty of the correctness of such accounts, and existence of discrepancies covered by bookkeeping devices will not avoid the new bond.

In *Willoughby v. Fidelity & Deposit Co. of Maryland*, 85 Pac. 713, 16 Okl. 546, 7 L. R. A. (N. S.) 548, 8 Ann. Cas. 603, affirmed, *Cherry v. Fidelity & Deposit Co.*, 27 Sup. Ct. 790, 205 U. S. 537, 51 L. Ed. 920, a bond for the faithful discharge of the duties of the president of a bank was issued by a surety company and accepted by the bank on the faith of statements made by the assistant cashier concerning the conduct, duties, employment, and accounts of the president. It was held, that a receiver of the bank, subsequently appointed, in an action on the bond, could not be heard to question the authority of the assistant cashier to bind the bank by such statements, and at the same time be allowed to recover on the bond procured on the strength thereof.

So in *Stapleton Nat. Bank v. United States Fidelity & Guaranty Co.*, 115 N. Y. Supp. 372, 131 App. Div. 157, reversing 113 N. Y. Supp. 25, 60 Misc. Rep. 206, the defense to a complaint on a renewal contract of insurance, indemnifying against the dishonesty of a bank cashier, alleged that the contract was renewed "on the faith of a statement in writing signed by the bank, its officer, or agent, one 'G.' (the cashier), who was the duly authorized agent of said plaintiff and duly authorized to sign the same, and that his authority to

sign the same was obtained as a part of the duties and responsibilities imposed on him as cashier." It was held, that the defense was not demurrable as showing that the party insured made the statement individually and not as agent of the bank.

It has also been held contrariwise, however, that where a bond declared that statements by the bank as to the accounts of its cashier should be deemed warranties, statements by the cashier as to the examination of his accounts made to procure the bond cannot be deemed a warranty by the bank (*Equitable Surety Co. v. Bank of Hazen*, 181 S. W. 279, 121 Ark. 422, Id., 181 S. W. 1200, 121 Ark. 630).

In *Hunter v. United States Fidelity & Guaranty Co.*, 167 S. W. 692, 129 Tenn. 572, a certificate by a bank to a guaranty company for renewal of a fidelity bond for its cashier, certifying that his books were examined in the regular course of business and found correct, etc., "and he is not now in default," was held not a warranty of the correctness of such accounts, and the phrase "and he is not now in default" not a warranty.

In *Max J. Winkler Brokerage Co. v. Fidelity & Deposit Co. of Maryland*, 44 South. 449, 119 La. 735, however, a recovery was denied on substantially identical facts.

In *United States Fidelity & Guaranty Co. v. Newton*, 115 Pac. 897, 50 Colo. 379, it was held that the fact that a suit on a fidelity indemnity bond is prematurely brought, contrary to a provision in the bond, must be taken advantage of by defendant by a special plea.

Rev. St. Mo. 1909, §§ 7024, 7026, relating to the construction of warranties of fact, and section 6937, relating to misrepresentations, has been held not to apply to fidelity bonds (*Commercial Bank v. American Bonding Co.*, 187 S. W. 99, 194 Mo. App. 224).

On other hand, St. Wis. 1913, § 4202m, as to when representations or warranties avoid policies, has been held applicable to fidelity bonds (*Whinfield v. Massachusetts Bonding & Ins. Co.*, 154 N. W. 632, 162 Wis. 1).

2437-2439. (b) Same—Knowledge of facts relating to risk

2437 (b). The fact that the employé had previously been a defaulter is no defense, where the employer, at the time of applying for the bond, had no knowledge thereof.

Legler v. United States Fidelity & Guaranty Co., 103 N. E. 897, 88 Ohio St. 336; *Alabama Fidelity & Casualty Co. v. Alabama Penny Sav. Bank (Ala.)* 76 South. 103.

The tendency is, however, to hold that an employer's indemnity bond insuring against loss by the infidelity of employes is enforceable only where the employer, in making statements on which the bond was issued, used the information it had bearing on the subjects inquired about, and believed, in good faith, in the truth of the statements, and used proper care to acquaint itself with the facts.

United States Fidelity & Guaranty Co. v. Shepherds' Home Lodge No. 2, 174 S. W. 487, 163 Ky. 706; *Fidelity & Guaranty Co. of New York v. Western Bank*, 94 S. W. 3, 29 Ky. Law Rep. 639; *Aetna Indemnity Co. v. Farmers' Nat. Bank of Boyertown, Pa.*, 169 Fed. 737, 95 C. C. A. 169; *Employers' Liability Assur. Corporation v. Stanley Deposit Bank*, 149 S. W. 1025, 149 Ky. 735; *National Bank of Tarentum v. Equitable Trust Co. of Pittsburg*, 72 Atl. 794, 223 Pa. 328; *Glidden v. United States Fidelity & Guaranty Co.*, 84 N. E. 143, 198 Mass. 109.

In *Bank of Hardinsburg & Trust Co. v. American Bonding Co. of Baltimore, Md.*, 156 S. W. 394, 153 Ky. 579, materially false answers by president of a bank to a surety company on application for a fidelity bond for its cashier, recklessly made without personal knowledge or any investigation, was held to amount to fraud upon the surety company, avoiding its policy.

In *Poultry Producers' Union v. Williams*, 107 Pac. 1040, 58 Wash. 64, 137 Am. St. Rep. 1041, it was held that a corporation which, before applying for a policy of indemnity insurance, was advised that the accounts of one, the faithful discharge of whose duties it desired to insure, did not balance, the cash deposits exceeding the amount shown by the books, was charged with the duty of ascertaining the true condition of the books before representing to insurer that they were correct.

Where a bank, in order to acquire knowledge on which to base its statements as to the honesty of an employe in an application to a guaranty company for a bond for such employe, employs an expert examiner to examine such employe's accounts, on whose examination and report it bases such statements, it is not chargeable with such examiner's negligence, where it has used due care in selecting the examiner (*Fidelity & Guaranty Co. of New York v. Western Bank*, 94 S. W. 3, 29 Ky. Law Rep. 639).

In *Southern Surety Co. v. Tyler & Simpson Co.*, 120 Pac. 936, 30 Okl. 116, it was held that the fact that the question: "Is there now or has there been any shortage due you by applicant?" was answered by insured in a fidelity bond, "No; not that we know of," which answer was made in good faith after the usual and customary ex-

amination of the books, but which failed to discover existing defalcations, will not discharge the surety in the fidelity bond; no false representations or warranty having been made, and the insurer having accepted the statement without further or more definite information.

In *Roark v. City Trust, Safe Deposit & Surety Co.*, 110 S. W. 1, 130 Mo. App. 401, it was held that where an employer had obtained a complete contract of insurance against loss through dishonesty of an employé, but had not procured the policy of insurance, the employer was not guilty of fraud in not disclosing his knowledge of loss when writing to the insurer and its agent inquiring why the policy had not been issued and delivered to him, since the knowledge or ignorance of the defalcation of the employé would not in any way affect the contract.

In an action on a fidelity bond, questions of insured's good faith in applying for a renewal, and whether it had used due care to learn of any default in duty by its officer are for the jury.

United States Fidelity & Guaranty Co. v. Shepherds' Home Lodge No. 2, 174 S. W. 487, 163 Ky. 706; *Aetna Indemnity Co. v. Farmers' Nat. Bank of Boyertown, Pa.*, 169 Fed. 737, 95 C. C. A. 169; *Title Guaranty & Surety Co. v. Nichols*, 32 Sup. Ct. 475, 224 U. S. 346, 56 L. Ed. 795, affirming judgment 100 Pac. 825, 12 Ariz. 405.

2439-2440. (c) Same—Effect of false statements

2439 (c). A representation in an application for a policy of indemnity or insurance needs only to be substantially true, but a warranty must be strictly true.

Poultry Producers' Union v. Williams, 107 Pac. 1040, 58 Wash. 64, 137 Am. St. Rep. 1041; *Commercial Bank v. American Bonding Co.*, 187 S. W. 99, 194 Mo. App. 224.

False statements which are warranties, make the policy void ab initio, though made in good faith.

Owen v. United States Surety Co., 131 Pac. 1091, 38 Okl. 123; *Wolverine Brass Works v. Pacific Coast Casualty Co. of San Francisco*, 146 Pac. 184, 26 Cal. App. 183; *Grand Lodge, A. O. U. W., of Rhode Island v. Massachusetts Bonding & Ins. Co.*, 94 Atl. 859, 38 R. I. 276.

A misrepresentation in an application for an insurance policy renders the policy void on the ground of fraud.

Title Guaranty & Surety Co. v. Bank of Fulton, 117 S. W. 537, 89 Ark. 471, 33 L. R. A. (N. S.) 676; *Owen v. United States Surety Co.*, 131 Pac. 1091, 38 Okl. 123; *Commercial Bank v. American Bonding Co.*,

187 S. W. 99, 194 Mo. App. 224; *St. Louis Police Relief Ass'n v. American Bonding Co. of Baltimore*, 196 S. W. 1148, 197 Mo. App. 430.

Under St. Wis. 1913, § 4202m, statements in application for fidelity bond unintentionally false were held not to prevent recovery; where insurer's agent made an investigation and report, in reliance on which the bond was issued (*Whinfield v. Massachusetts Bonding & Ins. Co.*, 154 N. W. 632, 162 Wis. 1).

In most cases it is held, however, that a misrepresentation of a material fact in reliance on which a contract of insurance is issued avoids the contract, whether the representation was made intentionally and knowingly or through mistake and in good faith.

United States Fidelity & Guaranty Co. v. First Nat. Bank of Dundee, 84 N. E. 670, 233 Ill. 475, affirming 137 Ill. App. 382; *American Bonding & Trust Co. of Baltimore v. Burke*, 85 Pac. 692, 36 Colo. 49; *Glidden v. United States Fidelity & Guaranty Co.*, 84 N. E. 143, 198 Mass. 109; *Krey Packing Co. v. United States Fidelity & Guaranty Co.*, 175 S. W. 322, 189 Mo. App. 591; *Max J. Winkler Brokerage Co. v. Fidelity & Deposit Co. of Maryland*, 44 South. 449, 119 La. 735; *Fidelity & Deposit Co. of Maryland v. Guthrie Nat. Bank*, 87 Pac. 300, 17 Okl. 397; *Home Sav. Bank of Columbus v. Massachusetts Bonding & Ins. Co.*, 91 S. E. 494, 19 Ga. App. 352.

The parties to a contract of insurance are entitled to determine for themselves what representations shall be material to the risk (*United States Fidelity & Guaranty Co. v. First Nat. Bank*, 137 Ill. App. 382, judgment affirmed 84 N. E. 670, 233 Ill. 475).

Where an insurer would have issued an indemnity policy knowing the truth as to the matters claimed to have been misrepresented, and was not influenced by the representations made, their falsity would not avoid the contract (*Liverpool & London & Globe Ins. Co. v. Lester* [Tex. Civ. App.] 176 S. W. 602).

So in *American Bonding & Trust Co. of Baltimore v. Burke*, 85 Pac. 692, 36 Colo. 49, it was held that where, after the execution and delivery of a bond securing the faithfulness of an employé, the employer signed a written statement containing an agreement that it should be taken and deemed as the basis of the bond, the statement was material to the execution of the bond.

Where a fidelity bond provided that any willful misstatement or suppression of fact by the employer concerning the employed should render the bond void, a mere belief on the part of the employer's president that it was immaterial whether the questions asked were answered truly or not did not render such answers imma-

terial (*Fidelity & Casualty Co. v. Bank of Timmons ville*, 139 Fed. 101, 71 C. C. A. 299).

Ky. St. § 639, declaring that statements in application shall be deemed representations and not warranties, and that no representations unless material or fraudulent shall prevent recovery, applies to fidelity insurance.

Fidelity & Guaranty Co. of New York v. Western Bank, 94 S. W. 3, 29 Ky. Law Rep. 639; *American Bonding Co. of Baltimore v. Ballard County Bank's Assignee*, 176 S. W. 368, 165 Ky. 63; *United States Fidelity & Guaranty Co. v. Foster Deposit Bank*, 147 S. W. 406, 148 Ky. 776.

Under the Texas statute misrepresentations of insured are not a defense where notice of insurer's refusal to be bound is not given within 90 days after notice of the misrepresentations.

National Surety Co. v. Murphy-Walker Co. (Tex. Civ. App.) 174 S. W. 997; *Commonwealth Bonding & Casualty Ins. Co. v. Wright* (Tex. Civ. App.) 171 S. W. 1043.

In *United States Fidelity & Guaranty Co. v. Egg Shippers' Straw-board & Filler Co.*, 148 Fed. 353, 78 C. C. A. 345, it was held that a writing executed by a corporation for the purpose of procuring a fidelity bond insuring it against loss through the fraud or dishonesty of an officer, etc., is an application for insurance within the meaning of Iowa Code 1897, § 1741, which requires insurance companies to attach a copy of the application to each policy of insurance, and provides that the omission to do so shall preclude the company from pleading or proving any part of such application or the falsity of any representations made therein in an action on the policy.

In an action on an employers' indemnity policy, defendant could not rely on the falsity of statements in plaintiff's application, where such defense had not been pleaded.

United States Fidelity & Guaranty Co. v. Newton, 115 Pac. 897, 50 Colo. 379; *French v. Fidelity & Casualty Co. of New York*, 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011; *Goldman v. Fidelity & Deposit Co. of Maryland*, 104 N. W. 80, 125 Wis. 390.

In an action on an employers' indemnity policy, the burden is on defendant to show the falsity of any statements contained in plaintiff's application.

Goldman v. Fidelity & Deposit Co. of Maryland, 104 N. W. 80, 125 Wis. 390; *United States Fidelity & Guaranty Co. v. Foster Deposit Bank*, 147 S. W. 406, 148 Ky. 776; *Southern Surety Co. v. Tyler &*

Simpson Co., 120 Pac. 936, 30 Okl. 116; L. Black Co. v. London Guarantee & Accident Co., 144 N. Y. Supp. 424, 159 App. Div. 186.

In an action on an employers' indemnity policy, the entries of the employé, his reports and statements, made in the course of his duties in the employment, were admissible.

National Bank of Tarentum v. Equitable Trust Co. of Pittsburg, 72 Atl. 794, 223 Pa. 328; Goldman v. Fidelity & Deposit Co. of Maryland, 104 N. W. 80, 125 Wis. 390.

The sufficiency of evidence was considered in the following cases: United States Fidelity & Guaranty Co. v. First Nat. Bank of Dundee, 84 N. E. 670, 233 Ill. 475, affirming judgment 137 Ill. App. 382; Prosser Power Co. v. United States Fidelity & Guaranty Co., 73 Wash. 304, 132 Pac. 48; United States Fidelity & Guaranty Co. v. Citizens' Nat. Bank of Monticello, 143 S. W. 997, 147 Ky. 285, motion to correct judgment overruled 145 S. W. 750, 147 Ky. 810; American Fidelity Co. v. R. L. Ginsburg Sons' Co., 187 Mich. 264, 153 N. W. 709; Commercial Bank v. Maryland Casualty Co. (Mo. App.) 187 S. W. 103.

In action on treasurer's fidelity bond, it was for jury to say whether any representations inducing execution of bond were true or untrue, and whether statements were so material as to vary nature and character of risk (Home Sav. Bank of Columbus v. Massachusetts Bonding & Ins. Co., 19 Ga. App. 352, 91 S. E. 494).

In Fidelity & Casualty Co. v. Bank of Timmonsville, 139 Fed. 101, 71 C. C. A. 299, it was held that where a fidelity bond provided that any "willful misstatement" or suppression of fact by the employer, in his statement or declaration concerning the employed, should render the bond void from the beginning, the phrase "willful misstatement" was intended to mean any material false statement made with knowledge of its falsity, voluntarily, and not inadvertently, and hence an instruction that the bond was not avoided unless the misstatements were made "with intent to secure renewals of the bond" was erroneous.

2440-2441. (d) Same—Concealment

2440 (d). Categorical answers to questions in application are presumed to supply the insurer with all information necessary to acceptance or rejection of risk (Massachusetts Bonding & Insurance Co. v. Duncan, 179 S. W. 472, 166 Ky. 515).

A surety bond procured by an agent in favor of his principal is not invalid because the principal did not inform the insurer of the state of the agent's account at the time of its execution, where no

inquiry was made (*Citizens' Trust & Guaranty Co. of West Virginia v. Globe & Rutgers Fire Ins. Co.*, 229 Fed. 326, 143 C. C. A. 446, Ann. Cas. 1917C, 416).

Whether the employer should have mentioned in its application for an indemnity bond an advance made to the employé and whether failure to mention same was from bad faith is for the jury (*Kansas State Mut Hail Ass'n v. Title Guaranty & Surety Co.*, 155 Pac. 13, 97 Kan. 271, rehearing denied 97 Kan. 651, 156 Pac. 715).

2441-2444. (e) Same—Concealment or misrepresentation of particular facts

2441 (e). Where a contract between plaintiffs and their agents provided that the latter should have possession of certain goods as "brokers or commission merchants," a representation to a company issuing bonds insuring the fidelity of the agents that they were "brokers" is not a fraud vitiating the bond (*T. M. Sinclair & Co. v. National Surety Co.*, 107 N. W. 184, 132 Iowa, 549).

Where a bank on applying to a surety company for a bond indemnifying it against default of its cashier warranted that he was not engaged or about to engage in any other business, the fact that he wrote a little fire insurance, and was secretary of a local board of directors of a building association, did not amount to a breach of the warranty (*American Bonding Co. of Baltimore v. Morrow*, 96 S. W. 613, 80 Ark. 49, 117 Am. St. Rep. 72).

In *Glidden v. United States Fidelity & Guaranty Co.*, 84 N. E. 143, 198 Mass. 109, an auditor's finding that a statement by an employer in applying for insurance of the fidelity of an employé was untrue, in that examination of checks drawn against his bank account would have disclosed obvious forgeries cannot be controlled by the forged checks as evidence, however good the imitation of the employer's signature might be, since he knew just what checks he had intrusted to the employé.

2444-2446. (f) Credit insurance

2444 (f). In *L. Black Co. v. London Guarantee & Accident Co.*, 144 N. Y. Supp. 424, 159 App. Div. 186, it was held that where a printed statement, in an application for credit insurance, stating that the applicant knew nothing detrimental to the credit of any customer "which would affect his policy, except as follows," was stricken before the application was signed, the insured could presume that no information was required as to the doubtful accounts; and

hence his failure to give such information did not invalidate the policy.

2445 (f). An applicant for credit insurance must include within the term losses, amounts due from an insolvent who had made a conveyance for the benefit of creditors, though the exact amount was not determined (*L. Black Co. v. London Guarantee & Accident Co.*, 111 N. E. 241, 216 N. Y. 560, reversing 144 N. Y. Supp. 424, 159 App. Div. 186).

Where the evidence in an action on a credit indemnity policy conclusively showed that warranties of plaintiff's application were untrue, a verdict should have been directed for defendant (*Edward C. Moore Co. v. American Credit Indemnity Co. of New York*, 156 N. Y. Supp. 737, 170 App. Div. 660).

2446. (g) Title insurance

2446 (g). In *Vaughan v. United States Title Guaranty & Indemnity Co.*, 122 N. Y. Supp. 393, 137 App. Div. 623, it was held that in an action on a policy of title insurance, where plaintiff knew that there was at least doubt of the validity of his deed, the concealment of facts within his knowledge tending to show that the deed was not genuine was as fraudulent as affirmative misstatements, and his conduct was equivalent to a representation that so far as he knew his deed was genuine; hence it was error to direct a verdict for plaintiff.

2447. (New) Employers' liability insurance

2447 (New). A tramway is not a "railroad," within the provision of an application for an employer's liability policy stating that assured did not operate a railroad on its premises (*South Knoxville Brick Co. v. Empire State Surety Co.*, 126 Tenn. 402, 150 S. W. 92, Ann. Cas. 1913E, 107). In *McCullough v. Georgia Casualty Co.*, 137 Minn. 88, 162 N. W. 894, however, it was held that contractor's statement in application for insurance of risks under Workmen's Compensation Act that he did not operate a "steam railroad, switch, or side track," followed by the policy, was a material misrepresentation, where, unknown to insurer he used a "dinkey" steam locomotive on temporary tracks.

In *Columbian Exposition Salvage Co. v. Union Casualty & Surety Co.*, 77 N. E. 128, 220 Ill. 172, affirming 123 Ill. App. 245, it was held that in an application for employers' liability insurance the question and answer: "Q. No explosives or chemicals used except

as herein stated? A. No"—do not constitute a double negative, amounting to an affirmative.

2. FORFEITURE OF CONTRACT FOR BREACH OF PROMISSORY REPRESENTATION OR WARRANTY OR CONDITION SUBSEQUENT

2447-2448. (a) Fidelity insurance—Promissory warranties or representations and conditions subsequent

2447 (a). Representations in an application by a bank for fidelity insurance against loss by the fraud of the cashier of the bank that monthly the directors would by an examination of the books ascertain the correctness of his accounts are representations, and not warranties, within Ky. St. § 639, and a substantial compliance with the representations is sufficient, while in case of warranties there must be a strict compliance (United States Fidelity & Guaranty Co. v. Foster Deposit Bank, 147 S. W. 406, 148 Ky. 776). Similarly in United States Fidelity & Guaranty Co. v. Citizens' Nat. Bank of Monticello, 143 S. W. 997, 147 Ky. 285, motion to correct judgment overruled 145 S. W. 750, 147 Ky. 810, a statement in an application for an employer's indemnity bond was held a mere promissory representation.

Whether there has been a substantial compliance with promissory representations in an application for fidelity insurance so as to authorize a recovery on the policy is for the jury (United States Fidelity & Guaranty Co. v. Foster Deposit Bank, 147 S. W. 406, 148 Ky. 776).

A warranty in an application for liability insurance "that a truck is not rented to others" is not a continuing warranty, which will defeat recovery where the truck is subsequently rented (Mayor, Lane & Co. v. Commercial Casualty Ins. Co., 155 N. Y. Supp. 75, 169 App. Div. 772, modifying judgment [Sup.] 150 N. Y. Supp. 624).

2448-2449. (b) Same—Particular statements and conditions

2448 (b). Where a bond indemnifying an employer against loss by embezzlement of an employé described him as a collector and ticket distributor, and the original statement of the employer and its annual certificates thereafter conclusively show that it was not the intention that the employé's duties should be limited to such positions, and the company continued to accept premiums thereon for a number of years, it could not avoid liability on the ground that the employé had been given additional duties, unless it could

show that such extra duties were the cause of the defalcation or led to the same (*Fidelity & Deposit Co. of Maryland v. Colorado Ice & Storage Co.*, 103 Pac. 383, 45 Colo. 443). The retention and deposit in bank by a purchaser of property of an employer of part of the purchase price to await the decision of an appeal from a judgment against the employer for the death of an employé is not a violation of a clause of an employer's liability policy requiring the insured to co-operate with and assist the insurer (*Mears Min. Co. v. Maryland Casualty Co.*, 144 S. W. 883, 162 Mo. App. 178).

In *Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co.*, 154 Fed. 545, 83 C. C. A. 431, an original employer's liability bond issued in 1901 was renewed for a new consideration several times, "subject to all the covenants and conditions thereof." It was held that the renewal did not include a statement issued February 24, 1903, in which plaintiff represented that checks signed by the insured employé should be safe-guarded by certain other signatures, so that a failure to perform such representation did not relieve defendant from liability on the bond.

Although one bonded as "employé" was, during a part of the year, compensated on the net profits basis, the surety company was liable for his dishonesty, for he did not cease to be "employé" because of change in the method of fixing a portion of his compensation (*Adams Co. v. Nesbit*, 38 S. D. 6, 159 N. W. 869).

Where a fidelity bond was given to a fraternal order by a surety company to indemnify the order against embezzlement on the part of its treasurer, the surety company was discharged from any liability; the order failing to give 10 days' notice of shortage as required (*Grand Lodge Independent Western Star Order v. Illinois Surety Co.*, 189 Ill. App. 340).

The burden is upon defendant to prove breach of the conditions of the bond, and not on plaintiff to prove compliance therewith (*T. M. Sinclair & Co. v. National Surety Co.*, 107 N. W. 184, 132 Iowa, 549).

2449-2451. (c) Same—Precautions against loss

2449 (c). Where a fidelity bond provides that the obligee shall, as a condition to the surety's liability, make certain examination of books kept by the principal, there is no liability, where such condition is not complied with (*Adams Co. v. Nesbit*, 38 S. D. 6, 159 N. W. 869). But where there is nothing in the application for insurance against default by an employé, nor in the bond issued requir-

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ing the employer to make continuous effort in investigating as to the habits and character of the employé, he cannot be held to such duty (*Fidelity & Deposit Co. v. Colorado Ice & Storage Co.*, 103 Pac. 383, 45 Colo. 443).

Where a fidelity bond provided that the insured should observe all due and customary supervision over the employé to prevent a default, and that there should be a careful inspection of the employé's accounts and books at least once in every 12 months from the date of the bond, such provision constituted the measure of care required of assured, and waived provisions in the application that the employé should remit balances on the 10th of each month, should not be permitted to retain balances, that his accounts and books would be inspected and audited, and his outstanding accounts verified, at least once a month (*United American Fire Ins. Co. v. American Bonding Co. of Baltimore*, 131 N. W. 994, 146 Wis. 573, 40 L. R. A. [N. S.] 661).

But an agreement obligating the directors of a bank to verify the cashier's accounts, placed upon them merely the duty of exercising ordinary care, and did not require of them such an investigation of the cashier's accounts as a bank examiner or skilled bookkeeper would have made.

United States Fidelity & Guaranty Co. v. Foster Deposit Bank, 147 S. W. 406, 148 Ky. 776; *United States Fidelity & Guaranty Co. v. First Nat. Bank*, 137 Ill. App. 382, affirmed 84 N. E. 670, 233 Ill. 475; *American Bonding Co. of Baltimore v. Morrow*, 96 S. W. 613, 80 Ark. 49, 117 Am. St. Rep. 72; *United States Fidelity & Guaranty Co. v. Boley Bank & Trust Co.*, 43 Okl. 819, 144 Pac. 615; *United States Fidelity & Guaranty Co. v. Foster Deposit Bank's Receiver*, 156 S. W. 371, 153 Ky. 698; *Equitable Surety Co. v. Bank of Hazen*, 121 Ark. 422, 181 S. W. 279; 121 Ark. 630, 181 S. W. 1200.

A similar position was taken as to a bond indemnifying a mercantile establishment against the fault of its bookkeeper, who was authorized to handle daily cash receipts, in *Southern Surety Co. v. Tyler & Simpson Co.*, 30 Okl. 116, 120 Pac. 936. And to the same effect is *National Surety Co. v. Western Pac. Ry. Co.*, 200 Fed. 675, 119 C. C. A. 91, where the bond indemnified a corporation against defaults of its treasurer.

Where policy guaranteeing employer from loss by peculations of employé provided for monthly counting of cash securities in employé's custody, term "cash securities" must be treated as meaning bonds or negotiable instruments easily convertible into money

(Bissinger & Co. v. Massachusetts Bonding & Ins. Co., 83 Or. 288, 163 Pac. 592).

Where a bank complied with the promises made by it in an application for a bond insuring the fidelity of its cashier as to its supervision over him, the insurer cannot avoid liability on the ground that the usual and customary supervision was not exercised.

American Bonding Co. of Baltimore v. Ballard County Bank's Assignee, 185 Ky. 63, 176 S. W. 368; Title Guaranty & Surety Co. v. Nichols, 12 Ariz. 405, 100 Pac. 825.

2450 (c). Where the application made by the bank warranted that the books of the cashier would be examined by the auditing committee monthly, an examination by the auditing committee once in each month, but not on any fixed monthly date, was sufficient (American Bonding Co. of Baltimore v. Morrow, 96 S. W. 613, 80 Ark. 49, 117 Am. St. Rep. 72). So examination of accounts of plaintiff's cashier once a month and daily examination of the cashier's receipts, ledger, and banking account have been held a sufficient compliance with the requirements of a fidelity bond providing for monthly examination of books and daily and monthly accounting for funds and securities handled (Prosser Power Co. v. United States Fidelity & Guaranty Co., 73 Wash. 304, 132 Pac. 48). Where, however, an application for a policy insuring the fidelity of a delivery foreman provided that his accounts should be daily checked, evidence that the foreman's returns were accepted without verification was a complete defense to the insurer (Larrimore v. United States Fidelity & Guaranty Co., 132 Pac. 1050, 21 Cal. App. 767). So, where the application stated that the treasurer's accounts would be examined and verified every three months by trustees and the amount alleged to be in the bank was not verified, the employer failed to verify the funds in the possession of the treasurer as required by the application, relieving the company of liability (United States Fidelity & Guaranty Co. v. Downey, 38 Colo. 414, 88 Pac. 451, 10 L. R. A. [N. S.] 323, 120 Am. St. Rep. 128). Similarly where a balance was struck, and the employé was considered to have on hand the amount thereof, but no effort was made to ascertain whether the money was on hand, or in whose possession it was, the bank failed to comply with its warranties, and could not recover for a loss sustained (United States Fidelity & Guaranty Co. v. Bank of Batesville, 87 Ark. 348, 112 S. W. 957). So in Marion Iron & Brass Bed Co. v. Empire State Surety Co., 52 Ind. App. 480, 100 N. E. 882, a surety company was held discharged from liability on

an employé's fidelity bond on account of breach of conditions binding the obligee to require daily and monthly reports, and to check the employé's accounts.

Where factors were required by their contract with their principal to make certain reports of sales, etc., which, if inspected, would have shown the condition of their accounts, a provision of a surety company's bond insuring the fidelity and honesty of the factors that the principal should make "frequent audits and examinations" was not void for indefiniteness, but required the principal to examine with reasonable frequency the accounts furnished by the factor (*T. M. Sinclair & Co. v. National Surety Co.*, 107 N. W. 184, 132 Iowa, 549).

2451 (c). A provision in a bond that the employer should notify the surety of any default on the part of the employé and exercise due and customary supervision over his acts is in the nature of a condition subsequent (*United American Fire Ins. Co. v. American Bonding Co. of Baltimore*, 146 Wis. 573, 131 N. W. 994, 40 L. R. A. [N. S.] 661). Hence, under a provision requiring immediate notice to be given to the indemnity company of the discovery of any act of fraud or dishonesty on the part of the employé, where an item of such employé's fraudulent accounts is discovered, delay in notifying the company relieves it from liability.

Fidelity & Guaranty Co. of New York v. Western Bank, 94 S. W. 3, 29 Ky. Law Rep. 639 (three days); *Supreme Ruling of the Fraternal Mystic Circle v. National Surety Co.*, 99 N. Y. Supp. 1033, 114 App. Div. 889 (two weeks); *Gamble-Robinson Co. v. Massachusetts Bonding & Ins. Co.*, 113 Minn. 38, 129 N. W. 131 (four weeks).

It is not necessary, however, to give notice of each item or false entry appearing during the examination of a defaulting employé's accounts (*Fidelity & Guaranty Co. of New York v. Western Bank*, 94 S. W. 3, 29 Ky. Law Rep. 639). But the employer has been held bound to notify the indemnitor only of facts concerning his employés of which he should have actual knowledge, and not of facts of which he might have learned by examining the employé's books (*First Nat. Bank of Crandon v. United States Fidelity & Guaranty Co.*, 137 N. W. 742, 150 Wis. 601).

In *Dominion Trust Co. v. National Surety Co.*, 221 Fed. 618, 137 C. C. A. 342, Ann. Cas. 1917C, 447, insurer was relieved of liability for dishonesty of president of corporation, where the corporation never notified it of another act of dishonesty known to it. But in *Fidelity & Deposit Co. of Maryland v. Maile*, 177 Mich. 231 142 N.

W. 1087, the insurer was not relieved from liability for the agent's subsequent default because of the railroad company's failure to give notice to plaintiff of a prior error in the agent's account. A provision that the bond should be void if the bank failed to promptly notify the insurer in case any act of dishonesty came to its knowledge did not become operative because the officers or directors of the bank learned of acts of the cashier which were in fact dishonest if they were not known to be so at the time (*Ætna Indemnity Co. v. Farmers' Nat. Bank of Boyertown, Pa.*, 169 Fed. 737, 95 C. C. A. 169). So, the employer is not bound to report his suspicions to the company, even though they are strong enough to justify, in his opinion, the discharge of the employé; but, after suspicion is aroused, reasonable diligence must be used in pursuing inquiries as to the facts (*Fidelity & Guaranty Co. of New York v. Western Bank*, 94 S. W. 3, 29 Ky. Law Rep. 639).

In *Ætna Indemnity Co. v. J. R. Crowe Coal & Mining Co.*, 154 Fed. 545, 83 C. C. A. 431, the bond provided that the insurer should indemnify the employer against fraudulent or dishonest acts of the employé amounting to embezzlement or larceny. It was held that the notice required was one which would charge the employé with the commission of a felony, and hence the employer was not bound to give such notice until it had acquired knowledge sufficient to justify a reasonable man in making such a charge. Under the provision requiring the employer immediately on learning thereof to notify the guaranty company "of any act of omission or of commission on the part of the employé which may involve a loss for which the company is responsible," the employer is not required to give notice that on one occasion the employé was drunk and robbed of what the employer supposed was his own money, or that he was allowed to overdraw his account, and that payment of his commissions was stopped for a while for the purpose of having him pay the overdraft, and was afterwards commenced before the overdraft was paid (*Long Brothers Grocery Co. v. United States Fidelity & Guaranty Co.*, 110 S. W. 29, 130 Mo. App. 421).

The burden is on a surety to plead and prove breach of the employer's duty to take the required precautions against loss.

United American Fire Ins. Co. v. American Bonding Co. of Baltimore, 131 N. W. 994, 146 Wis. 573, 40 L. R. A. (N. S.) 661; *Title Guaranty & Surety Co. v. Nichols*, 32 S. Ct. 475, 224 U. S. 346, 56 L. Ed. 795, affirming judgment 100 Pac. 825, 12 Ariz. 405.

It is stated, however, in *Adams Co. v. Nesbit*, 38 S. D. 6, 159 N. W. 869, that in action on a fidelity bond, requiring the obligee, as condition of the surety's liability, to make certain examination of the books kept by the principal, the plaintiff obligee has the burden of proving compliance with such condition.

Sufficiency of evidence was considered in the following cases: *Southern Surety Co. v. Tyler & Simpson Co.*, 30 Okl. 116, 120 Pac. 936; *National Life Ins. Co. of United States of America v. Title Guaranty & Surety Co.*, 185 Ill. App. 221; *Louisville & N. R. Co. v. United States Fidelity & Guaranty Co.*, 125 Tenn. 658, 148 S. W. 671; *United States Fidelity & Guaranty Co. v. First Nat. Bank*, 137 Ill. App. 382, judgment affirmed 84 N. E. 670, 233 Ill. 475; *Southern Surety Co. v. First State Bank of Montgomery* (Tex. Civ. App.) 167 S. W. 833.

It is a question for the jury whether the bank had in good faith made reasonable examinations of the books and accounts of the cashier, as required by the contract with the guaranty company.

St. Louis Police Relief Ass'n v. American Bonding Co. of Baltimore, 197 Mo. App. 430, 196 S. W. 1148; *Hunter v. United States Fidelity & Guaranty Co.*, 167 S. W. 692, 129 Tenn. 572.

So it is a question for the jury whether, under all the evidence, the messenger of an express company omitted to exercise due care; and the fact that he failed to chain the car doors on the inside, as required by a rule of the express company, would not, as matter of law, be such negligence as to render the insurer liable on the policy (*Great Northern Express Co. v. National Surety Co.*, 113 Minn. 162, 129 N. W. 127, 31 L. R. A. [N. S.] 775). So, on the evidence, whether plaintiff had knowledge that the agent was unreliable or unworthy of confidence, the refusal to communicate which avoided the bond, was a question for the jury (*National Union Fire Ins. Co. of Pittsburg, Pa., v. Empire State Surety Co.*, 80 N. J. Law, 405, 78 Atl. 164).

2452-2453. (e) Contract insurance

2452 (e). Where a building contract, the performance of which is secured by a guaranty insurance bond, reserves the right to make changes in the work and order extras in writing without limit, the fact that such changes are made and extras ordered verbally, and audited and allowed by the architect, does not release the bond (*Hormel & Co. v. American Bonding Co. of Baltimore*, 112 Minn. 288, 128 N. W. 12, 33 L. R. A. [N. S.] 513).

2453 (e). In *Hormel & Co. v. American Bonding Co. of Baltimore*, 112 Minn. 288, 128 N. W. 12, 33 L. R. A. [N. S.] 513, a guaranty insurance bond to indemnify one against loss from failure of the principal to perform the conditions of a building contract provided that the obligor should be notified of any breach of the contract, or any act of the principal which might involve loss to the obligor, immediately after the knowledge thereof should come to obligee. It was held that it was sufficient if notice was given only within a reasonable time, in view of all the circumstances. The bond also provided that the obligee should notify the obligor in writing of any breach of the contract by the principal, or any act on his part which might involve a loss for which the obligor would be liable, immediately after the terms of such act should come to the knowledge of the obligee. The work under the contract was to be completed by March 1st, but the general contract was not then entirely completed. On April 6th suit was brought against the principal by materialmen for materials furnished and used in the construction of the work, and the obligee was garnished. On April 16th the obligee, being informed that the principal would be pressed for money with which to meet his obligations unless he received payment for a bill for extras, paid the bill, and gave no notice to the obligor of the principal's default until April 27th, at or about which time the principal went into bankruptcy. It was held that the notice was not given within a reasonable time, as required by the bond.

2453-2454. (f) Employers' liability insurance.

2453 (f). Where the employment specified in an indemnity policy is "manual classification of work operating and maintenance of electric plant and distributing system, including ordinary repairs and renewals, etc.," the words "ordinary repairs and renewals" may be construed to allow employer to attach labor saving machinery to his plant to assist in getting coal to its furnaces (*Springfield Light, Heat & Power Co. v. Philadelphia Casualty Co.*, 184 Ill. App. 175). Where insured warranted that the premises were occupied as an apartment hotel, a temporary suspension of business, rendered necessary by a fire in the hotel, was not a breach of such warranty (*Harbor & Suburban Bldg. & Sav. Ass'n v. Employers' Liability Assur. Corporation, Limited*, of London, England, 140 N. Y. Supp. 717, 79 Misc. Rep. 150). Where an indemnity policy provides that all mangle machines owned or operated by the assured

should have safety guards adjusted so as to prevent the fingers or hands of the employés from being drawn into the rolls, this is not a guaranty by the assured that the guards used would be such as would prevent injury, but an agreement to operate such machines only as would practically accomplish the use for which they were intended and be so guarded that as far as practicable they would prevent injury to employés (*Despatch Laundry Co. v. Employers' Liability Assur. Corp.*, 118 N. W. 152, 105 Minn. 384, granting rehearing of 105 Minn. 384, 117 N. W. 506).

The following question and answer contained in an application for an insurance policy is construed as constituting an agreement not to use explosives: "Q. Any explosives or chemicals used except as herein stated? A. No." *Columbian Exposition Salvage Co. v. Union Casualty & Surety Co.*, 123 Ill. App. 245, judgment affirmed 77 N. E. 128, 220 Ill. 172.

2454 (f). A clause in a policy indemnifying an employer against loss for injuries to employés, which permits insurer to take charge of an action against the employer for injuries to an employé and forbids settlement at the initiative of the employer, relates only to the liability of the insurer to the employer, and does not forbid a settlement with the injured employé, provided the employer takes such course independently of his contract (*Breeden v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 220 Mo. 327, 119 S. W. 576). So a clause of an indemnity insurance policy restricting the right of settlement by assured does not prevent insured from settling a claim against it for the amount of damages in excess of the amount covered by the policy (*General Accident, Fire & Life Assur. Corp. v. Louisville Home Tel. Co.*, 175 Ky. 96, 193 S. W. 1031, L. R. A. 1917D, 952).

Contradictory testimony given by mistake by an officer of the insured is not a breach of the condition in a casualty insurance policy that the insured should render all possible assistance in the trial of the case against it (*Taxicab Motor Co. v. Pacific Coast Casualty Co. of San Francisco, Cal.*, 73 Wash. 631, 132 Pac. 393).

2454. (New) Title insurance

2454 (New). Under policy of title insurance issued to mortgagee of realty providing that rights under policy should cease on transfer of title except when transferred with insurer's approval, mortgagee's release of two properties from his lien did not avoid the policy, but reduced insurer's liability, if they had any value over

and above mortgage (Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Central Trust & Savings Co., 255 Pa. 322, 99 Atl. 910).

2454. (New) Accident liability insurance

2454 (New). Where automobile accident policy did not preclude settlement by owner for excess liability, he had right to protect himself with respect to such liability without consulting defendant, and defendant's withholding of consent either in good or bad faith, was immaterial (*McAleenan v. Massachusetts Bonding & Ins. Co.*, 179 App. Div. 34, 166 N. Y. Supp. 184). And a policy of automobile accident insurance, providing insured might not incur expenses or settle claim "except at his own cost," did not forbid settlement by insured for excess liability (*McAleenan v. Massachusetts Bonding & Ins. Co.*, 159 N. Y. Supp. 401, 173 App. Div. 100; order affirmed 219 N. Y. 563, 114 N. E. 114).

Statements by an insured under an automobile indemnity policy to injured person that he was insured and would try to get a settlement, and that a lawyer coming to see the claimant represented the insurance company and not the insured, although he might call himself the insured, did not constitute an "interference with negotiations for compromise," prohibited by the policy (*Hopkins v. American Fidelity Co.*, 158 Pac. 535, 91 Wash. 680).

A warranty of the insured incorporated into a policy indemnifying it against liability for injuries caused by its horses and vehicles, that no known, "vicious animal is used," was continuing and related to a known vicious horse subsequently purchased (*Hygienic Ice & Refrigerating Co. v. Philadelphia Casualty Co.*, 147 N. Y. Supp. 754, 162 App. Div. 190). It was said in the same case that a proviso excepting loss caused "by any animal or vehicle while being driven by any person under the age of 16 years," also containing a warranty that such a person would not be permitted "to drive," did not cover a loss caused by a horse being led by a boy under that age.

(904)

